

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





75-7663

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 75-7663

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AJAX HARDWARE MANUFACTURING CORPORATION

Plaintiff-Appellant,

-v.-

INDUSTRIAL PLANTS CORPORATION

Defendant-Appellee.

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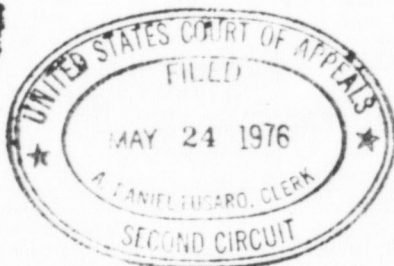
On Appeal From The United States District Court  
For The Southern District Of New York

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JOINT APPENDIX

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DOCKET ENTRIES  
PORTIONS OF RECORD ON APPEAL

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69 Civil 1900

C. Form No. 106 Rev.

**JUDGE PIERCE**

A-1

DATE	PROCEEDINGS	Date Order of Judgment Not
May 5, 69	Filed complaint and issued summons.	
May 6-69	Filed order appointing Louis P. Cantolupo to serve summons and complaint. Clerk.	
May 9-69	Filed summons and return. Served Industrial Plants Corp. on 5/5/69.	
May 26, 69	Filed stip and order that defts time to answer to the complaint is extended to <del>xxxx</del> 6.9.69 Mc Leand, J.	
June 5, 69	Filed Defts notice to take deposition of Pltff.	
June 6-69	Filed Notice of Examination of plaintiff.	
June 6-69	Filed ANSWER to complaint.	NLDF!
June 12-69	Filed Jury Demand by Plaintiff.	
June 23, 69	Filed Defts notice of motion ret. 2 6.26.69 for and order granting a protective order.	
June 23, 69	Filed Defts memorandum of law in support of motion.	
June 26, 69	Ordered Motion withdrawn. Tashner, I. Mailed notice.	
Jan. 13-70	Filed Notice to take oral deposition of Hirschmann Corp. by Martin H. Kaefar, W.P.	
June 19-72	Filed deft's notice of motion. Re: Protective Order. Ret. 6-29-72	
June 19-72	Filed deft's memorandum in support of motion.	
June 19-72	Filed plttf's notice to take deposition of Howard Klein, a witness.	
June 28-72	Filed stipulation that the return date of the motion of deft for protective order is adj. from 6-29-72 to 7-11-72	
June 29-72	Filed stip and order that the return day of the motion of the deft for a protective order be adjourned from 6-29-72 to 7-18-72 Brieant J.	
Aug. 15-72	Filed Murray Gartner, Affdvt. for plttf. in opposition to deft's motion for a protective order, etc.	
Sep. 26-72	Filed Memo Endorsed on motion filed 6-19-72--It is the order of this Court that the plttf. serve a new notice for the conduct of a deposition of the witness in New York City on not less than 10 day's notice; or, that the plttf. proceed by way of written interrogs; or, that oral deposition be taken in California at a time and place convenient to both counsel, the costs and expenses to be borne by each party, subject to later taxation by the successful party, Pierce, J.	M/N
Sep. 6-72	Filed Notice of Deposition	
Jan 2, 73	Filed Objections to Direct Questions by Dft. Notice of Cross Questions & Cross Questions to Howard M. Klein.	
Jan 19, 73	Filed Pltffs. Notice of Reframed Direct Questions, to Howard M. Klein.	
Jan 19, 73	Filed Pltffs. objections to cross questions.	
June 29, 73	Filed Order this matter is referred to Magistrate Raby as indicated. Pierce J. (m/n)	
Sep. 21-73	Filed deposition of Howard M. Klein, Los Angeles, Calif., dated Feb. 6, 1973	
Jan 18, 74	Filed Pltffs. Pre Trial Order. Pierce J.	
Feb. 8-74	PRE-TRIAL CONFERENCE HELD BY <del>Levet, J.</del>	
Feb. 8-74	PRE-TRIAL CONFERENCE HELD BY LEVET, J.	
Feb. 8-74	Action reassigned to Levet, J.	
Sep. 16-74	Before Levet, J. Pre trial conference held, trial date tentatively set for 10-29-74.	
Mar. 6-75	Before Levet, J. Jury trial begun, case postponed upon deft's application until 4-21-75, application granted only upon conditions imposed by the court. Levet, J.	
4-17-75	PRE-TRIAL CONFERENCE HELD BY <del>Levet, J.</del>	

Cont'd on page #2



DATE	PROCEEDINGS	Date Order Judgment N
pr. 23-75	BEFORE Levet, J. Jury trial begun.	
pr. 24-75	Trial continued.	
pr. 25-75	" "	
pr. 28-75	" "	
pr. 29-75	" "	
pr. 30-75	" "	
ay. 01-75	" & concluded. Jury verdict for plttf in the sum of \$70,000.00 Judgment entered, but execution of same stayed for 10 days pending determination of motions. Levet, J.	
ay. 16-75	Filed transcript of record of proceedings dated 4-23, 24, 25, 28, 1975 before Levet, J.	
5/18/75	Filed transcript of record of proceedings, dated 3/6/75	
05-28-75	Filed Pltff's Affidavit & Notice of motion re: order directing judgment in respect to damages for plttf in sum of \$161,895.75, etc. ret. 5/27/75, 9:30 A.M.	
5-28-75	Filed Deft's Affidavit & Notice of motion re: order directing judgment n.o.v. for deft on Count II, ret. 5/19/75, 9:30 a.m.	
<del>5-28-75</del>	<del>Filed Deft's Affidavit &amp; Notice of motion re: order directing judgment n.o.v. for deft on Count II, ret. 5/19/75, 9:30 a.m.</del>	
<del>5-28-75</del>	<del>Filed Deft's Affidavit &amp; Notice of motion re: order directing judgment n.o.v. for deft on Count II, ret. 5/19/75, 9:30 a.m.</del>	
<del>5-28-75</del>	<del>Filed Deft's Affidavit &amp; Notice of motion re: order directing judgment n.o.v. for deft on Count II, ret. 5/19/75, 9:30 a.m.</del>	
05-29-75	Filed OPINION #42488. Court grants deft's motion insofar as I direct jury's verdict of 5/1/75 be set aside and order new trial of all issues. New trial will commence 6/12/75, 10:00 A.M. Levet, J(mn)	
06-09-75	BEFORE Levet, J. Pre-trial conference held = Trial put over until Oct. 6, 1975. Judge's Decision, on condition that plttf waive the interest recoverable on any award for damages he may recover, said interest is waived from June 6-75 until Oct. 6th, 1975 or date of trial.	
06-05-75	Filed Pltff's affidavit & notice of motion to amend memorandum & Order dated 5-28-75.	
06-11-75	Filed Memorandum & Order #42582: A completely new trial as to all issues is absolutely necessary & see no value in certifying the memorandum & Order dated 5-28-75 for an interlocutory appeal. Therefore, I deny plttf's request. So ordered. Levet, J. m/n	
06-12-75	Filed True copy from the USCA: A petition for a writ of mandamus having been filed with a motion for a stay. Ordered that said petition is denied. Clerk shall serve a copy of this order on the judge named respondent & all other parties to the action in the trial court. Clerk.	
06-24-75	Filed plttf's affidavit & notice of motion to disqualify Judge Levet, ret. 6-23-75.	
06-24-75	Filed Memo-endorsed on plttf's motion filed this date to disqualify Judge Levet. Motion denied. So ordered. Levet, J. m/n	
07-01-75	Filed transcript of record of proceedings dated 4-17-75	
07-01-75	" " " " " " " 4-18-75.	
" "	" " " " " " " 4-29-75.	
" "	" " " " " " " 4-29-75.	
" "	" " " " " " " 4-30-75.	
07-01-75	" " " " " " " 4-30-75.	
8/6/75	Filed transcript of record of proceedings, dated 6/2/75	

Cont'd on page #3

## Page #3

DATE	PROCEEDINGS	Date Of Judgment
09-12-75	Before Levett, J. Hearing begun & concluded. To be ready for retrial when called, & granted, the def't's oral application to shorten the period for pl'tff. to respond to a rule 34 request to produce from 30 days to 12 days.	
09-22-75	Before Levett, J. Hearing begun & concluded. To be tried on Oct. 14th, 75	
10-17-75	<sup>Courtroom 401</sup> Filed One envelope impounded by order of Judge Levett, J. & place in vault room 601.	
10-14-75	Before Levett, J. Jury trial begun.	
10-15-75	Trial continued.	
10-16-75	" "	
10-17-75	" "	
10-20-75	" "	
10-21-75	" "	
10-22-75	" "	
10-23-75	" " & concluded. Jury verdict for def't., court orders judgment to dismiss complaint with costs.	
10-24-75	Filed Judgment: Order that def't. have judgment against pl'tff. dismissing th complaint, with costs to be taxed. Levett, J. Judg. Ent. C-1-75.	
11-11-75	Filed transcript of record of proceedings dated 9-12-75.	Ent. 10-28-75
11-11-75	Filed pl'tff's objections to deposition testimony.	
11-11-75	Filed pl'tff's designation of deposition testimony.	
11-25-75	Filed pl'tff's notice of appeal to the USCA from final judgment entered on 10-28-75. Mailed notice to Monasch Chazen & Steam.	
11-26-75	Filed Bond on costs on appeal in the sum of \$250.00 by the Royal Globe Insurance Co.	
1-22-76	Filed plaintiff's proposed requests to charge(received in chambers on Feb. 19-74).	
1-22-76	Filed plaintiff's supplemental request to charge(received in chambers on Feb. 19-74).	
1-22-76	Filed defendants' request to charge(received in chambers on Feb. 19-74).	
1-22-76	Filed defendant's additional requests to charge(received in chambers on Apr. 14-75).	
1-22-76	Filed defendant's affidavit re: adjourning hearing date(received in chambers on Mar. 5-75).	
1-22-76	Filed <del>def't's</del> plaintiff's affidavit in support of application for adjournment of trial(rec in chambers on Apr. 14-75).	
1-22-76	Filed plaintiff's trial brief(received in chambers on May 9-75).	
1-22-76	Filed Memo. of law in support of defendant's motions under Rules 50 and 59(received in c on May 9-75).	
1-22-76	Filed Memo. in support of plaintiff's motion for judgment notwithstanding the verdict(re in chambers on May 12-75).	
1-22-76	Filed reply Memo. in opposition to defendant's motions under rules 50 and 59(received in on May 22-75).	
1-22-76	Filed defendants reply memo. of law(received in chambers on May 22-75).	
1-22-76	Filed defendant's affidavit in opposition to plaintiff's motion seeking an order amending memorandum and order of this court dated May 28-75(received in chambers on May 21-75).	
1-22-76	Filed defendant's Memo. of law in opposition to plaintiff's motion for a certification u 28 U.S.C. 1292(b)(received in chambers on May 28-75).	
1-22-76	Filed Affidavit of def't. re: conduct of plaintiff's attorney, etc.(received in chambers Jun 20-75).	
1-22-76	Filed letter dated July 10-75, from Judge Levett to counsels.	
1-22-76	Filed letter dated July 23-75, from Arnold C. Stream to Judge Levett.	
1-22-76	Filed plaintiff's proposed special verdict and objections to special verdict(received in chambers on Sept. 2-75).	



DATE	page 4	PROCEEDINGS	Levet, J.
1-22-76		Filed defendant's Memo, respecting plaintiff's proposed special verdict.	
1-22-76		Filed defendant's request for production of documents pursuant to Rule 34 FRCP(recei in chambers on Sept. 11-75).	
1-22-76		Filed plaintiff's response to deft's request for production of documents dated Sept. 10-75(received in chambers on Sept. 22-75).	
1-22-76		Filed Defendant's Motion for protective order and other relief(received in chambers Sept. 25-75).	
1-22-76		Filed deft's Notice of intention to amend deft's answer(received in chambers on Sept 30-75).	
1-22-76		Filed Memo, in opposition to plaintiff's motion and in support of deft's cross-motio addressed to deft's notice for discovery and inspection(received in chambers on Sept 25-75).	
1-22-76		Filed deft's notice of cross-motion pursuant to Rule 37 FRCP(received in chambers on Sept. 25-75).	
1-22-76		Filed deft's requests for admissions(received in chambers on Sept. 25-75).	
1-22-76		Filed plaintiff's designation of trial counsel(received in chambers on Sept. 29-75).	
1-22-76		Filed stipulation re: various motions submitted by parties on Sept. 23 and 24th( rec in chambers on Oct. 2-75).	
1-22-76		Filed deft's designation of trial counsel(received in chambers on Sept. 30-75).	
1-22-76		Filed deft's request for a preliminary charge(received in chambers on Oct. 3-75).	
1-22-76		Filed deft's requests to charge(received in chambers on Oct. 3-75).	
1-22-76		Filed deft's notice of intention to seek the amendment of the pre-trial order(receiv in chambers on Oct. 3-75).	
1-22-76		Filed deft's second second notice of intention to amend deft's answer(received in chambers on Oct. 3-75).	
1-22-76		Filed Affidavit in opposition to deft's notice of intention to amend answer and pre- trial order(received in chambers on Oct. 8-75).	
1-22-76		Filed plaintiff's requests to charge(received in chambers on Oct. 9-75).	
1-22-76		Filed deft's reply affidavit(received in chambers on Oct. 10-75).	
1-22-76		Filed plaintiff's memo. of law in opposition to deft's application to amend its ans and the pre-trial order(received in chambers on Oct. 10-75).	
1-22-76		Filed deft's first supplemental requests to charge(received in chambers on Oct. 10-75).	
1-22-76		Filed deft's second supplemental requests to charge(received in chambers on Oct. 10-75).	
1-22-76		Filed deft's memo. of law(received in chambers on Oct. 7-75).	
1-22-76		Filed plaintiff's additional special verdict question(received in chambers on Oct. 7-75).	
1-22-76		Filed plaintiff's additional requests to charge(received in chambers on Oct. 7-75).	
2-10-76		Filed plttf-Appellant's designation of exhibits.	
2-20-76		Filed transcript of record of proceedings taken on 4-23, 24, 28, 29, 30, & 5-1-75.	
3-02-76		Filed transcript of record of proceedings taken on 10-14, 16, 17, 20, 197 10-21, 22, 23, 1975.	
3-12-76		Filed plttf's affidavits & notice of motion correcting the record on appeal by adding the attached "Statement of proceedings rec. 3-25-76.	
3-12-76		Filed transcript of proceedings-opening statements-dated April 23-75.	
3-22-76		Filed deft's objections to plttf's proposed further statement of proceedings dated 3-4-76 served on 3-11-76.	
3-24-76		Filed affidavit of E.A.Brill in support of motion to correct record on appeal.	
3-22-76		Filed affidavit of A.C.Stream in opposition to motion of deft. Re: record on appeal.	
3-31-76		Filed Memorandum & Order #44146: The court approves only Paragraph 3 plttf's proposed statement for inclusion by the clerk of the dist court in the record on appeal. Motion by counsel for plttf-appell is granted to the extent as indicated, is otherwise denied. Levet	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AJAX HARDWARE MANUFACTURING CORPORATION,	:	
	:	69 Civ.
Plaintiff,	:	
-against-	:	<u>COMPLAINT</u>
INDUSTRIAL PLANTS CORPORATION,	:	
Defendant.	:	

----- x

Plaintiff, by its attorneys, Poletti Freidin  
Prashker Feldman & Gartner, as and for its Complaint against  
the defendant herein, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Jurisdiction. This Court has jurisdiction of  
this action pursuant to 28 U.S.C. §1332, since (a) the  
parties are citizens of different states and (b) the matter  
in controversy, exclusive of interest and costs, exceeds  
the sum of Ten Thousand Dollars (\$10,000).

2. The plaintiff. Plaintiff is a corporation  
organized and existing under the laws of the State of  
California and has its principal place of business in the  
County of Los Angeles, State of California.

3. The defendant and its business. Upon infor-  
mation and belief, defendant is a corporation organized and  
existing under the laws of the State of New York and main-  
tains its office and principal place of business at 211 East  
43rd Street, in the City, County and State of New York. At  
all times relevant to this action, defendant held itself out  
to plaintiff and the public as a firm which was in the busi-



ness of, and expert in, the appraisal and auction sale of industrial machinery and equipment and related merchandise, with long experience and special knowledge, which extended to and included the machinery and equipment involved herein.

4. Defendant contracts to make appraisal report with knowledge of its purpose.

(a) On or about August 12, 1966, in contemplation of a prospective Loan and Security Agreement with Time & Micro Instruments, Inc. of Strasburg, Pennsylvania ("Time & Micro"), as more fully described below, plaintiff entered into a contract in New York with defendant whereby defendant agreed to appraise the machinery, equipment, tooling, accessories, expendable tools, office furniture, office equipment, and miscellaneous factory equipment of Time & Micro and to advise and report to plaintiff the true market value thereof. Plaintiff agreed to pay to defendant for such a true and accurate appraisal report one-half of one percent of the amount of the appraisal.

(b) Prior to the time that plaintiff and defendant contracted for such appraisal report as aforesaid, defendant knew why plaintiff required such report, namely, that plaintiff would loan Two Hundred Seventy Thousand Dollars (\$270,000) to Time & Micro or arrange for such a loan, guaranteed by plaintiff, if, and only if, an appraisal of the aforesaid machinery and equipment of Time & Micro, which was to secure such loan, showed a value substantially in excess of the face amount of the loan plus interest and the expenses of liquidation which could reasonably be anticipated, thus removing any substantial risk to plaintiff in making or guaranteeing such loan.

5. Defendant's undertaking. Defendant undertook and agreed with plaintiff that it would make an appraisal of the aforesaid machinery and equipment of Time & Micro in a careful, accurate, skillful, diligent and industrious manner, having in mind the particular purpose for which plaintiff sought said appraisal, and render a report thereon.

6. Defendant reports its appraisal to plaintiff.

(a) Initial report.

On or about August 17, 1966, defendant telegraphed to plaintiff its preliminary appraisal report, as follows:

"IN ACCORDANCE WITH YOUR VERBAL INSTRUCTIONS WE HAVE EXAMINED AND APPRAISED THE MANUFACTURING FACILITIES OF TIME AND MICRO INSTRUMENTS INC. STRASBURG PENNA EXCLUSIVE OF INVENTORY STOP IN OUR OPINION THE FAIR MARKET VALUE OF THE MACHINERY, EQUIPMENT, ACCESSORIES, TOOLING, OFFICE FURNITURE AND EQUIPMENT AND MISCELLANEOUS FACTORY EQUIPMENT IS \$919,072.00 STOP THE INPLACE VALUE IS \$137,806.00 TOTAL INPLACE VALUE OF PLANT IS \$1,056,878.00 STOP THE PLANT EQUIPMENT IS IN EXCELLENT CONDITION, THE MACHINERY CONTAINED THEREIN IS MAINLY OF SWISS MANUFACTURE AND IS NOT AVAILABLE TO AMERICAN MANUFACTURERS UNLESS THEY ARE MEMBERS OF THE TRUST AND EVEN THEN THE DELIVERY OF THIS TYPE OF MACHINERY RANGES BETWEEN 2 AND 3 YEARS STOP MANUFACTURERS IN THIS COUNTRY WOULD PAY IMPORTANT PREMIUMS OVER AND ABOVE THE VALUES AS ESTABLISHED IF THIS WERE MADE AVAILABLE TO THEM [...] TO OUR KNOWLEDGE THERE IS NOT ONE EXISTING PLANT IN THIS COUNTRY SO EQUIPPED [...] THE GENERAL MACHINERY MARKET IS PRESENTLY HIGHER THAN IT EVER HAS BEEN IN OUR EXPERIENCE OF 50 YEARS IN THIS DEAL STOP WHILE IT IS DIFFICULT TO PROJECT MARKET VALUES FOR THE NEXT TWO YEARS IT IS INCONCEIVABLE THAT THE VALUE OF THIS PLANT COULD BE LESS THAN 60 PERCENT OF THE APPRAISED FIGURE

"INDUSTRIAL PLANTS CORP  
" JESSE THALER VICE PRESIDENT".

(b) Confirmation.

On or about August 19, 1966, defendant confirmed the said telegraphed appraisal report by mailing to plaintiff from its New York City offices a detailed appraisal report,



together with a letter restating the conclusions set forth in its August 17 telegram, but increasing its appraisal of the "fair market value" of such property to \$919,085, and consequently the "inplace value" to \$1,056,891, instead of \$919,072 and \$1,056,878, as set forth in its telegram.

7. Plaintiff's performance. Plaintiff has performed all of the obligations under the aforesaid contract between it and defendant: on its part to be performed, including the payment to defendant of the sum of Four Thousand Four Hundred Twenty-Two and 71/100 Dollars (\$4,422.71) for its appraisal report.

8. Plaintiff enters into a Loan and Security Agreement with Time & Micro. On or about August 18, 1966, plaintiff, in reliance upon defendant's said appraisal report, entered into a Loan and Security Agreement with Time & Micro. Said Agreement provided, among other things, that plaintiff would obtain a loan for Time & Micro in the sum of Two Hundred Seventy Thousand Dollars (\$270,000) or lend it that amount for a period of one hundred twenty (120) days from the date of execution of a promissory note evidencing such loan and that in order to secure such loan, Time & Micro would deliver to plaintiff or a lending institution all documents necessary to create a valid first lien on the equipment and machinery of Time & Micro theretofore appraised by defendant. In the absence of the said appraisal report, plaintiff would not have entered into the said Loan and Security Agreement.

9. Plaintiff guarantees the loan to Time & Micro. As it was contractually obligated to do under the said Loan

and Security Agreement, plaintiff agreed to and did guarantee a loan from the First Western Bank and Trust Company ("Bank") for Time & Micro in the amount of Two Hundred Seventy Thousand Dollars (\$270,000). Time & Micro's obligation was evidenced by a promissory note from Time & Micro to Bank dated September 9, 1966 and was secured by a security agreement establishing a first lien in favor of the Bank on the machinery and equipment of Time & Micro which had been appraised by defendant as aforesaid.

10. Default and Auction Sale. Time & Micro defaulted on its said note, and on or about October 10, 1967, less than 14 months after defendant's appraisal report, defendant conducted an auction sale of the machinery and equipment covered by the aforesaid security agreement, which had been the subject of defendant's earlier appraisal. At said auction, virtually all the aforesaid machinery and equipment of Time & Micro was sold for a total price of \$145,069.00.

11. Defendant's breach of contract. In its appraisal of the machinery and equipment of Time & Micro and in making its report to plaintiff on or about August 17, 1966, as aforesaid, defendant breached its contract to make a true and accurate appraisal for plaintiff, and its obligation to plaintiff to make such appraisal in a thorough, diligent, prudent, careful, and accurate manner, having in mind the particular purpose for which defendant sought said appraisal, in that it represented that the "fair market value" was \$919,085, that the "inplace value" was \$1,056,891, and that it was "inconceivable" that a sale held within two



years would produce "less than 60%" of those figures, when in fact the value of virtually all of the said machinery and equipment was not more than \$145,069.00.

12. Plaintiff's damages. On or about May 20, 1968, plaintiff paid to the Bank in discharge of its said guarantee of Time & Micro's note, the sum of One Hundred Sixty-One Thousand Eight Hundred Ninety-Five and 75/100 Dollars (\$161,895.75) in full satisfaction of the unpaid balance of principal and interest of the said promissory note of Time & Micro to Bank. Said amount constitutes the damages suffered by plaintiff as a result of defendant's breach of its contract, as aforesaid.

AS AND FOR A SECOND CAUSE OF ACTION

13. Plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" through "4", "6" through "10", and "12", above.

14. Defendant's duty. Defendant, knowing that plaintiff must rely on its appraisal report, owed the duty to plaintiff to exercise the usual and ordinary care, skill, prudence, ability, knowledge and industry used by appraisers in such matters, in appraising Time & Micro's said machinery and equipment.

15. Defendant's negligent appraisal and report. Defendant, in appraising the machinery and equipment of Time & Micro and reporting thereon to plaintiff as aforesaid, wholly and grossly failed to exercise the usual and ordinary care, skill, prudence, knowledge, ability and industry used

by appraisers in such matters, and thus negligently and to the damage of plaintiff appraised and reported to plaintiff the aforesaid machinery and equipment of Time & Micro as having a total "fair market value" of \$919,085, when in fact such property was not worth more than \$145,069.00.

16. Plaintiff's damages. As a result of defendant's said negligence in making the appraisal and reporting to plaintiff, as aforesaid, plaintiff suffered damages in the amount of \$161,895.75, as set forth above.

AS AND FOR A THIRD CAUSE OF ACTION

17. Plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" through "12", above.

18. Defendant's fraud. At the time that defendant represented that it would perform as stated in paragraph "5" hereof defendant did not intend so to perform. In reporting its appraisal of the machinery and equipment of Time & Micro, as aforesaid, moreover, defendant made representations which were known to it to be false when made, or which were made by defendant recklessly and without any knowledge that the same were true and careless of whether they were true or false and without any reasonable grounds to believe that they were true.

19. Defendant's fraudulent concealment. At the time it reported its appraisal of the machinery and equipment of Time & Micro to plaintiff as aforesaid, defendant then knew facts and circumstances sufficient to cause it to suspect the falsity of such report, which facts and circum-

stances were unknown to plaintiff and were fraudulently suppressed and concealed from it by defendant.

20. Plaintiff's reliance. Plaintiff, at the time defendant made its contract with plaintiff and when defendant reported its appraisal, did not know the true value of the machinery and equipment which was the subject of the appraisal, as aforesaid, but believed defendant's appraisal report to be true and relied upon it and was thereby induced to and did obligate itself to guarantee Time & Micro's note to Bank and suffered damages as aforesaid.

WHEREFORE, plaintiff demands judgment against defendant in the amount of One Hundred Sixty-One Thousand Eight Hundred Ninety-Five and 75/100 Dollars (\$161,895.75), together with interest from May 20, 1968 as compensatory damages, and Fifty Thousand Dollars (\$50,000) as exemplary damages, together with the costs and disbursements of this action.

Dated: New York, New York  
May 5, 1969.

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By 5  
Murray Gartner  
A Member of the Firm

Attorneys for Plaintiff  
Office and P. O. Address  
777 Third Avenue  
New York, N.Y.  
688-3200



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff,

69 Civ. 1900

-against-

ANSWER

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

Defendant, by its attorneys, Nettie Lewy Dowd  
Fox Ness & Stream, as its answer to the complaint herein  
alleges as follows:

1. Denies each and every allegation contained  
in paragraph 1 of the complaint.
2. Admits all of the allegations in paragraph 3  
of the complaint except denies that it held itself forth  
as possessing special knowledge, which extended to and in-  
cluded the machinery and equipment involved in this action.
3. Denies each and every allegation contained  
in paragraphs 4 and 5 of the complaint.
4. Denies knowledge or information thereof suf-  
ficient to form a belief as to each and every allegation  
contained in paragraphs 8 and 9 of the complaint.
5. Denies each and every allegation contained in  
paragraph 10 of the complaint, except admits that on or  
about October 10, 1967 defendant did conduct an auction  
sale of certain machinery and equipment.

6. Denies each and every allegation contained in paragraphs 11 and 12 of the complaint.

7. Answers the allegations incorporated by reference in paragraph 13 of the complaint in the manner hereinabove alleged.

8. Denies each and every allegation contained in paragraphs 14, 15 and 16 of the complaint.

9. Answers the allegations incorporated by reference in paragraph 17 of the complaint in the manner hereinabove alleged.

10. Denies each and every allegation contained in paragraphs 18, 19 and 20 of the complaint.

AS AND FOR A FIRST, SEPARATE  
AND COMPLETE DEFENSE

11. The complaint fails to state a claim upon which any relief can be granted.

NETTER LEWY DOWD FOX NESS & STREAM

By 

Arnold C. Stream  
A member of the firm  
Attorneys for plaintiff  
Office & P.O. Address  
660 Madison Avenue  
New York, New York 10021  
838-5335



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
----- x

*U.S. District Court  
Filed  
Jan 18 1974  
50 JLV  
69 Civ. 1900 LWF*

PRE-TRIAL ORDER

On January 11, 1974, the parties to this action by their attorneys appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings as amended.

3. (a) The parties stipulated that the facts listed in Appendix A (attached hereto) are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues).

(b) It is the plaintiff's contention that:

1. As to liability:

(i) The plaintiff engaged the defendant, which represented itself to be expert in the appraisal, auction and sale of industrial machinery and equipment, to make



a true and accurate appraisal of the machinery and equipment owned by a manufacturing corporation, Time & Micro Instruments, Inc. ("Time & Micro"), located in Strasburg, Pennsylvania, with which plaintiff was considering entering into a loan agreement, if the machinery and equipment would be adequate security for the contemplated loan.

(ii) On August 12, 1966,

(A) the plaintiff informed the defendant that it wanted to know specifically whether at a forced sale the machinery and equipment would have sufficient value to assure net proceeds of at least \$250,000, the approximate amount of the proposed loan;

(B) the plaintiff informed the defendant of the need to have the appraisal information before the date on which it was to contract with Time & Micro with respect to the loan agreement, approximately six days later;

(C) the plaintiff instructed the defendant to make an independent appraisal as to the value of each item of machinery and equipment; and

(D) the defendant represented that it was familiar with and expert in the appraisal of the type of machinery and equipment involved; that the inspection of the machinery and equipment would take one day, and that it would undertake the appraisal in accordance with the plaintiff's requirements and instructions as stated above.

(iii) The defendant represented, and the plaintiff so believed, that it would exercise the usual and ordinary care, skill, prudence, ability, knowledge and industry used by professional appraisers, in the determination of the value of the machinery.

(iv) The defendant inspected Time & Micro machinery and equipment on August 15, 1966, and sent to plaintiff on August 17, 1966 a telegram giving its appraisal, including what the plaintiff understood to be the forced sale value of said machinery and equipment, which was more than double the amount of the proposed loan.

(v) In reliance on these appraisal results the plaintiff executed a Loan and Security Agreement on August 18, 1966, with Time & Micro which provided, among other things, that the plaintiff would guarantee a loan for Time & Micro in the sum of \$270,000, or lend it that amount, for a period of 120 days and that such loan would be secured by a valid first lien on the machinery and equipment that had been appraised by the defendant.

(vi) The defendant sent to plaintiff on August 19, 1966, its final detailed appraisal report, in which the sums of the individual values stated for individual items of machinery and equipment were substantially the same as the figures given in defendant's August 17, 1966 telegram.

(vii) Pursuant to the said Loan and Security Agreement, dated August 18, 1966, plaintiff entered into an agreement on September 1, 1966, to guarantee a loan from the First Western Bank and Trust Company ("Bank") to Time & Micro in the sum of \$270,000 for a period of 120 days. This loan was evidenced by Time & Micro's promissory note to the Bank, executed on September 9, 1966. Time & Micro defaulted on said note, and the plaintiff was thereby obligated to pay to the Bank the indebtedness of Time & Micro, remaining after sale of the machinery and equipment which was collateral for the loan.

(viii) On October 10, 1967 (less than 14 months after defendant's appraisal), the defendant conducted an auction sale, as it had been engaged by the Bank and Time & Micro to do, of said machinery and equipment. The proceeds of the auction sale plus the amount realized for the machinery unsold at the auction amounted to less than one-third of the sum that the defendant represented as the lowest conceivable amount the machinery and equipment could bring if sold within two years after the appraisal.

(ix) Defendant, by reason<sup>1</sup> of the facts above *EMB* stated, breached the contract between the parties made August 12, 1966, in that defendant failed to make an accurate appraisal for plaintiff and failed to make such appraisal in a careful and diligent manner; defendant was negligent in its appraisal and report in that it wholly and grossly failed to exercise the usual and ordinary care, prudence and industry used by appraisers in determining values; defendant defrauded the plaintiff in that defendant did not intend to fulfill its contractual obligations when it made them, in that defendant made representations to plaintiff that defendant knew were false when made or that it made without reasonable grounds to believe that they were true and in that defendant suppressed and concealed facts and circumstances sufficient to cause it to suspect the falsity of its appraisal report.

2. As to damages:

(i) Out of a total of 617 items (appraised by defendant at a total value of \$919,085 for "fair market value" and \$1,056,391 for "inplace value" and, in any event not less than 60% of the appraisal figures) plus office equipment



and furniture, all but 83 items were sold at the auction for a total price of \$144,278. This amount, less auction expenses and fees, was applied toward Time & Micro's indebtedness to the Bank.

(ii) The remaining 83 items (appraised by defendant at \$270,200) were finally liquidated at \$20,000, which amount was applied toward Time & Micro's indebtedness to the Bank.

(iii) On May 20, 1968, plaintiff paid to the Bank in discharge of its guarantee of Time & Micro's note, the sum of \$163,270.70 in full satisfaction of the unpaid balance and interest of Time & Micro's note and expenses incurred by the Bank in connection therewith. The Bank refunded to Ajax \$1,374.95 for overpayment of interest and the balance of an insurance refund, leaving a total of \$161,895.75 paid by Ajax in discharging its guarantee of Time & Micro's note. This amount, together with interest from May 20, 1968, constitutes the compensatory damages sought by the plaintiff in this action.

3. (c) It is the defendant's contention that:

1. As to liability:

(i) The plaintiff engaged the defendant -- which is an appraiser, auctioneer and liquidator of industrial machinery -- to make a fair market value appraisal of an entire manufacturing plant, as an entire plant, or "turn-key" operation. The plaintiff agreed to pay the defendant's fee therefor, based upon sliding scale percentages of the appraised value.

(ii) The plaintiff did not engage the defendant to appraise what value each separate item of machinery in said plant would have if sold at a forced sale action.

(iii) The plaintiff asked the defendant to make the physical appraisal, which would take at least all of one day, three days after the defendant was so engaged. The plaintiff (A) gave to defendant a two-year old appraisal of the machinery made by a third party and (B) arranged to have an officer of the plant owner fully familiar with the special machinery values accompany and aid the defendant in making the physical appraisal, and the plaintiff instructed the defendant to rely upon the facts contained in said earlier appraisal and upon the facts related by said officer as the basis for defendant's appraisal -- and "up-date" of the earlier appraisal.

(iv) The defendant made said appraisal on August 15, 1966, and sent to plaintiff on August 19, 1966 the written fair market value appraisal of the plant and a bill for services rendered. After the plaintiff later (A) asked for forced sale values of individual pieces of machinery (which defendant had not appraised and did not supply), (B) asked for and received from defendant a definition of what "fair market value" meant in the defendant's appraisal, (C) received from the defendant its own stand-by guarantee offer to purchase the entire plant machinery and equipment within six months for \$350,000, and (D) received additional invoices from defendant for its appraisal fee, the plaintiff paid to defendant the fair market value appraisal fee in full on or about November 30, 1966.

(v) The plaintiff's alleged agreement with the plant owner ("Time & Micro") did not require the plaintiff



to obtain a long-term bank loan and guarantee same for Time & Micro. Prior to its obtaining and guaranteeing said loan, the plaintiff had received from defendant a stand-by guarantee offering to buy all of the machinery and equipment for \$350,000 for six months. The plaintiff could have loaned Time & Micro the said \$270,000 for only 120 days under the alleged agreement prior to, and in lieu of, obtaining and guaranteeing the long-term bank loan. The defendant's offer would have still been in existence, and the market demand would not have changed within said 120-day period.

(vi) The bank did not rely upon the appraised report in making the loan to Time & Micro, guaranteed by the plaintiff. On or about August 29, 1966, the plaintiff asked the defendant for its stand-by guarantee offer to purchase the plant contents for \$350,000, and ~~advised the defendant that its bank wanted said offer.~~ *EMB* The defendant made said offer on *said date* ~~August 29, 1966.~~ It is alleged that the bank loan was made on September 9, 1966.

(vii) Individual pieces of machinery at the plant were sold at a forced sale auction on or about October 10, 1967. At that time there was not much market demand for individual pieces of such machinery. The defendant was engaged to conduct the auction, as auctioneer, and did so, for a fee.

2. As to damages:

(i) Before the bank made the alleged \$270,000 loan to Time & Micro, and the plaintiff guaranteed same, and on or about August 29, 1966, the plaintiff had received a stand-by guaranty offer by defendant to purchase all of the plant

contents for \$350,000 for six months. According to the agreement alleged by plaintiff, plaintiff could have mitigated its risk -- if not reduced same to zero -- by itself loaning \$270,000 to Time & Micro for only 120 days. The time period of the defendant's stand-by guarantee would have encompassed said 120-day period. Also, the market demand for such equipment remained essentially unchanged during said time period. Although not obligated to do so under its alleged agreement with Time & Micro, the plaintiff instead opted to obtain and guarantee the bank loan, which it alleged it did on September 9, 1966.

(ii) Approximately 83 pieces of machinery in the plant were not sold at the auction held on October 10, 1967, and remained as collateral for said loan. They were valued on August 15, 1966 in the aggregate, as part of the entire plant appraised value, at about \$270,200. Said machinery, or any proceeds of sale thereof, mitigate and reduce the damages alleged herein.

4. (a) The exhibits which each party now expects to offer at the trial are as follows:

(1) Plaintiff's exhibits

(i) Plaintiff's exhibits for identification marked during the oral depositions of the defendant's witnesses and numbered: 1, 2, 2a, 3, 4, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37, 38 and 39.

(ii) Plaintiff's exhibits for identification marked in the deposition upon written questions of Howard Klein: 1, 1a, 2a.



(iii) Documents identified in Appendix B (attached hereto) and numbered: 40-49.

(2) Defendant's exhibits

(i) Defendant's Exhibit B for identification marked during the oral deposition of Martin H. Kaefer.

(ii) Plaintiff's exhibits for identification marked during the oral depositions of the defendant's witnesses and numbered: 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 33, 35, 36, 37 and 38.

(iii) - ?

4. (b) Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party setting forth the reason why the exhibit was not theretofore identified. No exhibit may be offered at trial unless identified as above.

(c) The parties agree that the exhibits identified as above are authentic and may be offered in evidence (each party reserves the right to object to the relevancy of each document).

5. The parties agree that the witnesses whom each party now intends to call, along with the specialty of experts to be called, are those listed below. Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party in writing, setting forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified as below:

(a) Plaintiff's witnesses:

1. Norman Louis, President, Ajax Hardware Manufacturing Corporation
2. Howard Klein, former Executive Vice President, Ajax Hardware Manufacturing Corporation (until c. March, 1963)



Impressos  
5:47 B

- 5:47 B

(a) Plaintiff agrees to call no more than one expert witness on the issue of standard appraisal practices and no more than one expert witness on the watch manufacturing industry. ~~Plaintiff agrees to call no more than one expert witness on the issue of standard appraisal practices and no more than one expert witness on the watch manufacturing industry.~~

industry. ~~Prompt action of the removal of restrictions on the~~  
~~strategies shall be a condition of the defendant~~  
(b) Defendant agrees to call no more than

expert witnesses on the issue of any. Shall be given  
(c) prompt notice of the names of ~~any~~ said witnesses who shall be notified.  
~~and shall be given prompt notice of the names of said witnesses who shall be notified.~~

7. The following are all of the claims for damages or for other relief asserted by the plaintiff in this action, as of the date of this conference:

(a) Compensatory damages: \$161,895.75, together with interest from May 20, 1968;

(b) Exemplary damages: \$50,000.00

8. The parties also agreed on the following matters:

(a) Plaintiff at this time expects to require  $2\frac{1}{2}$  trial days.

(b) Defendant at this time expects to require 2 1/2 trial days.

9. The issues to be tried are formulated by the Court (with the consent and agreement of the Parties) as follows:

(1.) What were the terms of the <sup>oral</sup> agreement between plaintiff and defendant made on or about August 12, 1966?

(2) Did the defendant breach the aforementioned agreement with plaintiff?

(3) Was the defendant negligent in the performance of its services as plaintiff's appraiser?

(4) Did the defendant commit actionable fraud against the plaintiff by any misrepresentation or concealment of material information in connection with its services as plaintiff's appraiser?

(5) Assuming that the defendant breached its contract, or that defendant was negligent, or that defendant defrauded plaintiff, was plaintiff damaged thereby, and if so, in what amount?

(6) Were said damages caused by acts for which defendant is liable?

Dated: January 11, 1974.

CONSENTED TO:

POLETTI FREIDIN PRASHKER FELDMAN &  
GARTNER, ESQS.  
Attorneys for Plaintiff

By Murray Gartner  
MURRAY GARTNER

NETTER LEWY DOWD FOX NESS & STREAM, ESQS.  
Attorneys for Defendant

By Edward M. Berman  
EDWARD M. BERMAN

SO ORDERED:

L. W. Pierce 191  
LAWRENCE W. PIERCE  
U.S.D.J.

Appendix A

~~Proposed~~ Stipulations

2.4.5

1. Plaintiff, Ajax Hardware Manufacturing Corporation, is a corporation organized and existing under the laws of the State of California and has its principal place of business in the County of Los Angeles, State of California; at all times relevant to this action Norman D. Louis and Howard M. Klein were officers of the corporation and empowered to act on its behalf.

2. Defendant, Industrial Plants Corporation, is a corporation organized and existing under the laws of the State of New York and maintains its office and principal place of business at 211 East 43 Street in the City, County, and State of New York; at all times relevant to this action David Kriser, Sidney Kriser, *Robert Botwin* and Jesse Thaler were officers of the corporation and empowered to act on its behalf.

3. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars (\$10,000).

4. At all times relevant to this action, defendant held itself out to plaintiff and the public as a firm which was in the business of, and expert in, the appraisal and auction sale of industrial machinery and equipment and related merchandise.

5. At all times relevant to this action, Jesse Thaler was an officer of the defendant who made industrial machinery appraisals on behalf of the defendant and was a member of the American Society of Appraisers.

6. At all times relevant to this action, the plant of Time & Micro Instruments, Inc. ("Time & Micro") [formerly



the Precision Time Corporation] was located at Strasburg, Pennsylvania.

7. On or about August 17, 1966, defendant telegraphed to plaintiff its preliminary appraisal report.

8. On or about August 19, 1966, defendant mailed to plaintiff a detailed appraisal report.

9. On or about November 30, 1966, plaintiff paid to defendant the sum of \$4,422.71 in complete payment of defendant's appraisal fee.

10. On or about August 25, 1967, Time & Micro and the First Western Bank and Trust Co. ("Bank") employed defendant to conduct an auction sale of the various pieces of machinery and equipment at the Time & Micro plant, which auction sale defendant conducted on or about October 10, 1967.

11. Defendant publicized and advertised said auction sale prior to the date thereof.

12. The proceeds of the said auction sale for the items sold amounted to \$144,278.

## Appendix B

40. Continuing Guaranty by Ajax to First Western Bank and Trust Company, dated September 1, 1966.
41. Security Agreement between Time and Micro and First Western Bank and Trust Company, dated September 2, 1966.
42. Promissory note from Time and Micro to First Western Bank and Trust Company, dated September 9, 1966.
43. Credit memorandum from James Ryan to Ajax, dated November 13, 1967.
44. Letter from James Ryan to Stanton Oswald, dated February 1, 1968.
45. Letter from Howard Klein to Irvin Richlin, of the Richlin Company, dated February 22, 1968.
46. Letter from J. J. Leddy to Norman Louis, dated June 28, 1968.
47. Notice of Settlement and Final Judgment, filed February 4, 1965, in the matter of United States of America v. The Watchmakers of Switzerland Information Center, Inc., et al., Civ. No. 96-170, United States District Court, Southern District, New York.
48. Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers.
49. Receipts for payment of Ajax obligations to Bank under its Guaranty of the loan to Time & Micro.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING CORPORATION, :  
Plaintiff, :  
-against- : 69 Civ. 1900  
INDUSTRIAL PLANTS CORPORATION, :  
Defendant. :  
-----x

Plaintiff's Proposed  
Requests to Charge

Plaintiff, Ajax Hardware Manufacturing Corporation, submits herewith its proposed requests to charge the jury at the close of the trial.

No doubt developments during trial will necessitate revision of these requests to conform to the evidence presented as well as submission of additional requests. We will submit such new requests at the appropriate time.

Dated: New York, New York  
February 19, 1974

Respectfully submitted,  
POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By \_\_\_\_\_  
A Member of the Firm  
Attorneys for Plaintiff  
777 Third Avenue  
New York, New York  
(212) 688-3200



11. Contractual Duty to Use Care and Skill

Accompanying every contract is a duty to perform the thing agreed to be done with care, skill and faithfulness, and a wilful or negligent failure to observe any of these conditions is a breach of contract.

Therefore, if you believe that the defendant either wilfully or negligently performed its appraisal for the plaintiff without reasonable care, skill or faithfulness, then you may find Industrial Plants has breached its contract with Ajax Hardware Co.

Stanley L. Bloch v. Klein, 258 N.Y.S. 2d 501  
(Sup. Ct. N. Y. Co. 1965); Gagne v. Bertran, 43 Cal. 2d (1954)

## 12. Negligence

Negligence is defined generally as failure to exercise that degree of care rendered appropriate by the particular circumstances and which a person of ordinary prudence in the same situation and with equal experience would have exercised.

The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence.

Defendant, as a professional appraiser, has the duty to exercise the skill and degree and care which is reasonably expected of other professional appraisers in similar circumstances.

Therefore, if you believe that defendant failed to exercise that skill and degree of care which other professional appraisers would normally exercise under the same circumstances, you must find the defendant negligent in the performance of its services as the plaintiff's appraiser.

Oestreicher v. Simpson, 243 N.Y. 635 (1926);  
Stanley L. Bloch v. Klein, 258 N.Y.S.2d 501 (Sup. Ct. N.Y. Co. 1965); Gagne v. Bertran, 43 Cal.2d 481 (1954).



## 15. Fraud - Elements

To establish its fraud claim, plaintiff must have shown the following essential elements:

- (1) a false representation by defendant or concealment by defendant of information;
- (2) that defendant knew that the representation was false or had insufficient basis to make it; and
- (3) that defendant intended to induce plaintiff to act or to refrain from acting on the basis of its representation; and
- (4) that plaintiff justifiably relied on the representation in taking action thereon; and
- (5) that plaintiff suffered damage as a result of such reliance.

### Knowledge of Falsity:

To commit fraud by misrepresentation, defendant did not necessarily have to know that a statement or representation was false when made; the defendant had only to assert that a false statement or representation is true to its personal knowledge without reasonable grounds for believing it to be true.

### Duty Not to Conceal:

Defendant was under a duty not to conceal information if it had special knowledge, or means of knowledge not available to plaintiff and was aware that plaintiff was, or would be, acting under a misapprehension as to facts which would be of importance to it.

Intent May Be Inferred:

Defendant's fraudulent intent may be inferred if you find that defendant made improper representations with knowledge that plaintiff would act in reliance thereon, or if you find that defendant knowingly, recklessly, or carelessly made false statements, or if you find that defendant made statements as true to its own knowledge, when it had no knowledge on the subject.

Reliance:

You may find that plaintiff relied on defendant's statements if you find that they played a material and substantial part in leading plaintiff to adopt a particular course of action -- in this case, obligating itself to guarantee a loan to Time & Micro. It is not necessary that the representation be the decisive or paramount factor in bringing about plaintiff's action, so long as it plays a substantial part in affecting plaintiff's decision.

If you find that plaintiff relied on defendant's statements, you must further consider whether such reliance was justified. You may find that plaintiff justifiably relied on defendant's statement if you find that plaintiff hired defendant to supply information concerning matters on which it was ignorant, and that defendant's statement implied it knew facts which justified the statement. In this case the parties have stipulated as a fact, and you must therefore



accept as true, that defendant held itself out to the public as an expert in the appraisal of machinery and equipment.

W. Prosser, The Law of Torts, §§100, 103, 104 (13th ed. 1964); Potters Photographic Applications Co. v. Ealing Corp., 292 F.Supp. 92, 106 (E.D.N.Y. 1968); Ultramares v. Touche, 255 N.Y. 170 (1931); First National Bank of Hempstead v. Level Club, 241 App. Div. 433 (1st Dept. 1934); Gagne v. Bertran, 43 Cal.2d 481 (1954).

## 17. Damages Generally

The term "damages" describes the amount which the law awards as pecuniary compensation, or satisfaction, for an injury done or a loss sustained by reason of a breach of some duty or the violation of some right. Damages generally are of two kinds: (1) compensatory damages, which are given in satisfaction or recompense for a loss or injury, and (2) exemplary or punitive damages which may be awarded, beyond the actual damages sustained, because of the character of the acts complained of.

The plaintiff in this case is seeking both compensatory and exemplary damages.

Reid v. Terwilliger, 16 N.Y. 530, 534 (1889);  
Sanders v. Rolnick, 188 Misc. 627, 67 N.Y.S. 2d 652, (Sup. Ct. App. Term 1947) aff'd 272 A.D. 803, 71 N.Y.S.2d 896 (1st Dept. 1947).



18. Plaintiff's Claim for Compensatory Damages

Breach of Contract

If you find that the defendant did breach its contract, the plaintiff should be awarded those damages that are the natural and probable consequences of the breach or which in the ordinary course of events would likely result from the breach and which could reasonably have been foreseen or contemplated by the parties when the contract was made. In determining whether the damages claimed by plaintiff could reasonably have been foreseen as a result of defendant's breach, you should consider the nature and purposes of the contract and the circumstances known to the parties.

Negligence or Fraud

If you find that the defendant was negligent in the performance of its services as plaintiff's appraiser or did commit fraud, the plaintiff should be awarded those damages that result directly from and as a natural consequence of the negligence or fraud, even though they could not have been foreseen.

You must determine whether the damages claimed by the plaintiff are natural and ordinary consequences of defendant's negligence or fraud according to common experience and directly traceable to defendant's negligence.

### Damages Claimed

The plaintiff Ajax Hardware is seeking compensatory damages in the amount of \$161,895.75, which is that amount plaintiff claims to have lost as a result of defendant's breach, negligence or fraud, together with interest from May 20, 1968.

The plaintiff claims that it obligated itself to guarantee the loan to Time & Micro in reliance upon defendant's appraisal which showed that the Time & Micro machinery and equipment had sufficient value to secure the loan. When Time & Micro defaulted on its loan, plaintiff was legally obligated by its loan agreement to assume liability for any indebtedness of Time & Micro to the bank which might remain after the sale of the machinery and equipment. That indebtedness amounted to \$161,895.75. The plaintiff claims that it sustained this loss as a consequence of defendant's breach of contract, negligence or fraud in the performance of its services as plaintiff's appraiser.

Breach of Contract: For Children, Inc. v. Graphics Int'l, Inc., 352 F.Supp. 1280 (S.D.N.Y. 1972); New York Water Service Corp. v. City of New York, 4 A.D.2d 209, (1st Dept. 1957);

Negligence: Steitz v. Gifford, 280 N.Y. 15 (1939); Stanley L. Bloch Inc. v. Klein, 258 N.Y.S.2d 801 (Sup. Ct. N.Y. Co. 1965);

Fraud: W. Prosser, The Law of Torts, §105 (3d ed. 1964); Ultramares v. Touche, 255 N.Y. 170 (1931); Gagne v. Bertran, 43 Cal.2d 481, 490 (1954).



19. Plaintiff's Claim for Exemplary Damages

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant, which proximately caused actual injury or damage to the plaintiff, was wantonly, or recklessly done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "wantonly" or "recklessly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should

unanimously find, from a preponderance of the evidence in the case, that the defendant's act or omission, which proximately caused actual damage to the plaintiff, was wantonly or recklessly done; but the jury should always bear in mind that such extraordinary damages may be allowed, only if the jury should first unanimously award the plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

The plaintiff Ajax Hardware is seeking exemplary damages in the amount of \$50,000 in order to serve as an example to others not to engage in conduct such as that of the defendant complained of in this action.

Anderson v. Knox, 297 F.2d 702,728 (9th Cir. 1961), cert. denied 370 U.S. 915, 82 S.Ct. 1555; Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Soucy v. Greyhound Corp., 27 A.D. 2d (3d Dept. 1967)



PLAINTIFF'S SUPPLEMENTAL REQUESTS TO CHARGE  
Nos. 24, 25, 27, 29, 30

24 CONSTRUCTION OF APPRAISAL CONTRACT IN PLAIN,  
EVERY-DAY TERMS

You, as jurors, must determine what type of appraisal valuation was called for by the oral agreement made on August 12, 1966. In making that determination, you are to consider only the "plain, every-day common sense meaning" of the words which you find were employed by Howard Klein and Jesse Thaler in entering into that agreement. If you find that defendant, in making the agreement by its agent, Jesse Thaler, used technical appraisal terms without defining their meaning to plaintiff at that time, then I charge you that the burden is on defendant, Industrial Plants Corporation, to prove that its contractual obligation was limited to providing an "in-place going concern value," as defendant claims. If, on the other hand, you find that plaintiff requested an appraisal to determine whether the value of the machinery and equipment in the Time & Micro plant was sufficient as security for a loan of approximately \$250,000 to protect Ajax in the event of default on the loan, then you must find that defendant was obligated to provide that type of appraisal value or values which could reasonably be expected to serve plaintiff's stated purpose or purposes.

Maryland Casualty Co. v. Cook, 35 F. Supp. 160 (E.D. Mich., 1960); Aetna Insurance Co. v. Hellmuth, Okata & Kassabaum, Inc., 392 F.2d 472, 477 (8th Cir., 1968)

25 SPECIFICATION OF CONTRACT CLAIM

Plaintiff's contention as to the agreement made between the parties is summarized in the pre-trial order in this action which defines the matters in issue as follows:

(i) The plaintiff engaged the defendant, which represented itself to be expert in the appraisal, auction and sale of industrial machinery and equipment, to make a true and accurate appraisal of the machinery and equipment owned by a manufacturing corporation, Time & Micro Instruments, Inc. ("Time & Micro"), located in Strasburg, Pennsylvania, with which plaintiff was considering entering into a loan agreement, if the machinery and equipment would be adequate security for the contemplated loan.

(ii) On August 12, 1966,

(A) the plaintiff informed the defendant it wanted to know specifically whether at a forced sale the machinery and equipment would have sufficient value to assure net proceeds of at least \$250,000, the approximate amount of the proposed loan;

(B) the plaintiff informed the defendant of the need to have the appraisal information before the date on which it was to contract with Time & Micro with respect to the loan agreement, approximately six days later;



(C) the plaintiff instructed the defendant to make an independent appraisal as to the value of each item of machinery and equipment; and

(D) the defendant represented that it was familiar with and expert in the appraisal of the type of machinery and equipment involved; that the inspection of the machinery and equipment would take one day, and that it would undertake the appraisal in accordance with the plaintiff's requirements and instructions as stated above.

(iii) The defendant represented, and the plaintiff so believed, that it would exercise the usual and ordinary care, skill, prudence, ability, knowledge and industry used by professional appraisers, in the determination of the value of the machinery.

1. If you find that Mr. Thaler was told by Mr. Klein that the purpose of the appraisal was to determine whether the machinery and equipment would have sufficient value as collateral for a loan to Time & Micro of approximately \$250,000 and since defendant claims that it supplied only the "fair market value" of the plant in-place, as a going concern, I charge you that you must find that defendant failed to select the type of appraisal value which would meet plaintiff's expressed purpose in securing the services of an appraiser, and thus breached its contract.



2. In any event, even if you find that defendant undertook only to appraise the Time & Micro Plant as an entity, if you find that defendant did not determine the going concern "in-place value" of the machinery and equipment in a careful and professional way, you must find that defendant breached its contract.
3. If you find that defendant did not do its appraisal in a careful professional manner calculated to give reasonably reliable information as to values, I charge you that you must find that defendant breached its contract.

27. STANDARD OF CARE

In determining the ordinary standards of skill and degree of care which are reasonably expected of a professional appraiser, you should consider as evidence the testimony of the plaintiff's expert witness, Mr. George Sinclair, as to the ordinary and customary practices of professional appraisers, and the standards established by the Code of Ethics and Principles of Appraisal Practice of the American Society of Appraisers. While this evidence is not binding on you, you should consider it carefully in making your determination as to the reasonable standard of professional care which applied when Jesse Thaler, as agent for defendant, Industrial Plants Corporation, undertook for a fee to render a professional appraisal for plaintiff.

Aetna Life Insurance Co. v. Hellmuth, Okata & Kassabaum, Inc., 392 F2d 472, 478 (8th Cir., 1968); Wallner v. Kitchens of Sarah Lee, Inc., 419 F. d 1028, 1032 (7th Cir., 1969).



297 SPECIFICATION OF DEFENDANT'S NEGLIGENCE

Plaintiff claims that the defendant's conduct, in performing the appraisal, which it agreed to perform for plaintiff, was negligent in the following respects:

1. Defendant failed to inquire into the economics of the precision watch-manufacturing industry, or to make any other inquiry into the possible market for the machinery and equipment in the Time & Micro plant. Such an inquiry would have quickly shown that there was no market for the machinery as a complete unit for the manufacture of watches or fuses and no ready market for it as used machinery.
2. Defendant improperly relied on values found in a two-year old appraisal report, which had been supplied by plaintiff solely as an inventory listing the machines to be appraised to save time in making the appraisal, and defendant made no independent inquiry or determination as to the original cost or current replacement or market value of the machinery and equipment.

29 SPECIFICATION OF DEFENDANT'S NEGLIGENCE (Con't.)

3. Defendant improperly relied on statements as to the value of machinery made by Harry Haakenson, plaintiff's own employee.
4. Defendant failed to disclose that its appraisal was largely based on the information provided in the Hirschmann list and by Mr. Haakenson, but instead presented its appraisal as defendant's own professional, expert and scientific appraisal of the machinery and equipment.
5. Defendant did not turn on or otherwise adequately inspect the individual items of machinery and equipment to determine whether they were in operating condition.
6. Defendant's appraisal report failed to contain a statement of the objective for which the work was performed, leading to a foreseeable misunderstanding or misapplication of the appraisal by the plaintiff.



29 SPECIFICATION OF DEFENDANT'S NEGLIGENCE (Con't)

7. Defendant failed to define in its appraisal or accompanying letter the meaning of the term "fair market value" which was used in the appraisal.
8. Defendant's appraisal contained false statements and representations suggesting that the Time & Micro machinery and equipment was difficult to obtain and in great demand. Simple inquiry would have demonstrated that these statements were false.

These statements include:

- (a) "Manufacturers utilizing most high precision equipment of this nature would pay important premiums over and above the values established in our appraisal if this equipment were made available to them."
- (b) The machinery contained in the Time & Micro plant . . . "is not available to American manufacturers unless they are members of the trust, and even then the delivery of this type of machinery ranges between 2 and 3 years from the date of order."
- (c) "To our knowledge, there is not one existing plant in this country so equipped."

29 SPECIFICATION OF DEFENDANT'S NEGLIGENCE (Con't)

If you find that defendant did any of the eight separate thing which plaintiff claims defendant did in preparing and delivering its appraisal, I charge you that you must find that defendant was negligent in the preparation of its appraisal.



30" SPECIFICATION OF FRAUD CLAIM

Plaintiff claims that defendant made three major representations in its appraisal report which were false:

1. that machinery such as that in the Time & Micro plant was not available to American manufacturers unless they were members of the Swiss Trust and, even then, delivery might take two or three years;
2. that no plant in the United States was equipped with such machinery; and
3. that American manufacturers would pay premiums over the values stated in the appraisal if such machinery were made available to them.

Those statements could reasonably be expected to, and did, persuade plaintiff that the Time & Micro machinery was in great demand, eagerly sought for, and, therefore, of great value, even in excess of the values given in the appraisal. Plaintiff claims, moreover, that the entire appraisal report was a misrepresentation, since it purported to be based on Mr. Thaler's expert, independent professional judgment, and failed to reveal that it was, in fact, based on another two-year old appraisal made for a different purpose.

-30- SPECIFICATION OF FRAUD CLAIM (Con't.)

I charge you that in order to find fraud, you need not find that defendant knew its statements to be false. Nor is it a defense to the claim of fraud that defendant believed its statements when made. If you find that defendant had no reasonable basis for believing its statements to be true, that they were in fact false, and that plaintiff relied on them to its detriment, you must find that defendant defrauded plaintiff as claimed.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff

: Index No. 69 Civ. 1900

-against-

: AFFIDAVIT

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

STATE OF NEW YORK )  
                          ) SS.:  
COUNTY OF NEW YORK)

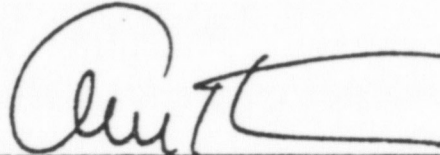
ARNOLD C. STREAM, being duly sworn, deposes and says.

1. I am a member of Monasch Chazen & Stream the attorneys for the defendant in this action, which is scheduled to commence on March 6, 1975.

2. I wish to advise the court that I am actively engaged in the prosecution of an action entitled Main Street Fashions, Inc. v. Zeiler, et al., in the Supreme Court of the State of New York, County of New York, before Hon. Milton Sanders.

3. I believe that matter will be concluded on March 7, 1975, so that I will be available in this matter on March 10, 1975. I

respectfully request an adjournment until that date.



Arnold C. Stream

Sworn to before me this  
5th day of March, 1975.

ROBERT GARY SMITH  
Notary Public, State of New York  
No. 2-113677  
Qualified in Kings County 7/6  
Commission Expires March 30, 1976.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

AJAX HARDWARE MANUFACTURING CORP., :

Plaintiff, : 69 Civ. 1900 (RHL)

-against- :

AFFIDAVIT

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

- - - - -x

STATE OF NEW YORK )

) ss.:

COUNTY OF NEW YORK)

MURRAY GARTNER, being duly sworn, deposes and says:

1. I am a member of the firm of Poletti Freidin Prashker Feldman & Gartner, attorneys for plaintiff in the above-entitled matter. I submit this affidavit in support of an application, made orally to the Court on April 17, 1975, for an adjournment of the trial in this case, which is scheduled to begin on April 21, 1975.

2. It was necessary to make the request for adjournment for two reasons: 1) the unanticipated illness of Mr. Norman Louis, former president of Ajax Hardware Corporation and an indispensable witness for plaintiff in the trial of this case; and 2) the Court's denial of plaintiff's request made on April 11, 1975, for a one-day adjournment of the trial date from

April 21 to April 22, 1975, because previously scheduled commitments of plaintiff's two expert witnesses would very likely have left plaintiff without any witness to present on April 22, 1975, even if Mr. Louis were available to testify on April 21.

3. I am fully familiar with the entire history of the scheduling of this matter, which has lingered on the Court's calendar for over a year despite the repeated efforts of plaintiff's counsel to obtain a fixed trial date sufficiently in advance to insure the attendance of witnesses and the orderly presentation of the case to a jury. On three separate occasions, a firm date for trial has been adjourned on the request of counsel for defendant. On each of those occasions, in March 1974, October 1974, and March 1975, plaintiff has been fully prepared to proceed to trial, but agreed to adjournment because defendant otherwise would have been disadvantaged.

4. The most recent adjournment at defendant's instance was caused when the case did not go forward as scheduled on March 6, 1975, because of the failure of defendant's attorney, Arnold Stream, Esquire to appear in Court at the time set for trial. Mr. Stream was engaged in another proceeding on that date. Plaintiff was in court and ready to proceed on March 6. Plaintiff's two witnesses to the events in issue, Mr. Norman Louis and Mr. Howard Klein, who reside in California, had come to New York prepared to testify March 6 and 7. Neither Mr. Louis nor Mr. Klein are employed by plaintiff, or in any other way



subject to plaintiff's control. Plaintiff's two expert witnesses were prepared to appear thereafter. All exhibits and papers necessary to the trial were ready. Nonetheless, rather than enter a default judgment, which was sure to be contested, and rather than forcing defendant to proceed without proper representation, plaintiff agreed to an adjournment of the case. Because plaintiff's California witnesses had only made available March 6 and 7 for appearance at the trial in New York, and could not remain for the following week, I requested that the Court give a date certain for trial "approximately the middle of April" (Tr., 16).<sup>\*</sup> The Court, however, set April 21, 1975 as the trial date with the following qualification:

"The first Monday in April is the 7th. The second one is the 14th. Make it the 21st. I may not be here at that time. I am trying to get a little time off."

(Tr., 18)

5. The next day I received a copy of a letter from the Hon. Richard H. Levet to Arnold Stream, dated March 6, 1975, stating that "... at the request of Mr. Gartner and with no objection from Mr. Smith, I adjourned this case to April 21, 1975 at 10:00 a.m. This is a fixed and peremptory date and both sides must be ready at that time; otherwise, the case will either be

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<sup>\*</sup> "Tr." followed by a number refers to page number of transcript of proceeding of March 6, 1975, annexed hereto as Exhibit 1.

dismissed against plaintiff or a default ordered against defendant." (A copy of that letter is attached hereto as Exhibit 2.)

6. Judge Levet's letter of March 6, 1975 (Exhibit 2) was a strong rebuke to Mr. Stream for his conduct in causing the adjournment of March 6, and imposed financial terms on defendant for causing that adjournment. Nonetheless, the April 21 trial date was fixed by the Court peremptorily against plaintiff, without plaintiff's having had the opportunity to check on the availability for trial of any of its witnesses during the week of April 21, 1975. (Plaintiff's witnesses had not arrived at Court when the conference in chambers was held on March 6).

7. Immediately upon return from Court on March 6, I made arrangements to notify plaintiff's four witnesses of the adjournment, and to ask about their availability for trial during the week of April 21, 1975. Within several days, I learned of certain schedule problems for Mr. Arthur Sinkler and Mr. George Sinclair, the two expert witnesses listed by plaintiff, in accordance with the pre-trial order herein. Mr. Sinkler would be unavailable on April 22 due to a meeting of the Board of Directors of the National Central Bank of Pennsylvania, of which he is a director. He also stated that he was obligated to attend a meeting on April 24 and 25 of the Board of the Pennsylvania State College and University Directors, of which he is the Board Chairman. Mr. Sinclair notified my office that he had long-standing Court



commitments in Philadelphia for both April 22 and 23.

8. At approximately the same time that I learned of the unavailability of plaintiff's expert witnesses on certain days in the week of April 21, Mr. Coyne, Judge Levet's senior law clerk, telephoned me to tell me that Judge Levet had been asked to sit on a three-judge panel in Connecticut during the week of April 21, and that he wanted to advance the trial date to the week beginning April 14. I told Mr. Coyne that I had encountered problems about the schedules of plaintiff's witnesses for the week of April 21 and that I would be glad to have the date advanced if the witnesses were available in the earlier week. Mr. Coyne agreed that I could have a day or two to check and report back to him. Before I could confirm the new date with plaintiff's four witnesses, however, Mr. Coyne telephoned me to say that the trial date would remain April 21. I repeated to him that I might have problems with that date, but that perhaps it would be best to wait until closer to that time to see what the situation was then.

9. Against the background of the Court's constant refusal to set a trial date certain after plaintiff and defendant had had the opportunity to determine that their witnesses would be available on that date, sudden attempts to set the trial date on mere hours' or one or two days' notice, the Court's own indication that he might not be available on April 21 at the very time that that

date was set, and the short-lived switch of the trial date even after it had been "peremptorily" set for April 21, there seemed to be no point in raising formal objections to the April 21 date unless the difficulties of presenting plaintiff's witnesses in orderly and continuous sequence remained unresolved at a time reasonably short of that date.

10. On April 11, 1975, I notified Mr. Coyne, Judge Levet's senior law clerk, that it appeared then that, since plaintiff's expert witnesses would not be available until April 23 and 24, plaintiff could not present a continuous case beginning on April 21. I requested that the start of the trial be adjourned for one day. On April 15, 1975, Mr. Coyne notified me by telephone that Judge Levet had denied the request for a one-day adjournment. Mr. Coyne also mentioned that Judge Levet was currently engaged in a trial.

11. On Wednesday, April 16, 1975, Mr. Coyne telephoned me to say that the trial in which Judge Levet had been engaged had ended, and that the Judge had instructed him to tell me that the Ajax trial would definitely start in Courtroom 2703 at 10:00 a.m. on April 21, 1975. Thus, although the Court's denial of plaintiff's request for a one-day adjournment, made ten days prior to the scheduled start of the trial, faced plaintiff with the prospect of beginning the trial on April 21, with the practical certainty that there would be a hiatus, on April 22, since the factual testimony of the first two witnesses could not reasonably be expected



to occupy two full trial days, even allowing for selection of a jury and opening statements, I telephoned Mr. Norman Louis in Los Angeles, California in the evening of April 16, 1975, to tell him that he should come to New York to testify on April 21, 1975.

12. In that telephone conversation, Mr. Louis told me that he had been informed by his physician the previous week that he had a heart problem, and that his physician had instructed him not to travel or to subject himself to any stress in the immediate future. I requested that Mr. Louis obtain such a written statement from his physician as soon as possible. On the following day, at approximately 1:45 p.m., Mr. Louis told me by telephone that the statement signed by his physician had been mailed to me air mail, special delivery.

13. Mr. Louis' testimony is essential to plaintiff's case. He was President of plaintiff during the entire period of time relevant to this case. He is the only witness who can identify certain critical documents and explain transactions which are the basis of this lawsuit. Mr. Louis has been listed as a witness for plaintiff since the pre-trial order was signed on January 11, 1974. His testimony is necessary to establish the circumstances surrounding the making of the agreement between plaintiff and defendant; to establish reliance by plaintiff on defendant's appraisal report made on or about August 17, 1966, in entering into the Loan and Security Agreement with the

Time & Micro Company; to establish further reliance on September 1, 1966, when plaintiff guaranteed a loan by Time & Micro, following conversations and correspondence with defendant's officers; to establish damages; and to refute any claim of waiver of performance of the contract.

14. This present request for an adjournment should be viewed against the whole history of the scheduling of this matter. The summons and complaint in this case were filed on May 5, 1969. On August 17, 1972, after conclusion of discovery procedures, the case was assigned to the Hon. Lawrence Pierce. On June 28, 1973, Judge Pierce assigned the case to Magistrate Harold Raby for the purpose of arriving at a pre-trial order; he requested that Magistrate Raby report back no later than four months from the date of assignment. On September 11, 1973, the parties were directed by Magistrate Raby to attend a pre-trial conference on October 3, 1973. Thereafter, the pre-trial order was signed by Judge Pierce on January 11, 1974. Then, because Judge Pierce was not then free to try a jury case for at least three months, the case was assigned to Senior Judge Levet for trial.

15. At the direction of Judge Levet, both parties submitted requested jury instructions on February 19, 1974. From the very beginning, I requested a date certain for trial, to be set after both parties had been able to ascertain that their witnesses would be available. Plaintiff's four witnesses were all actively



engaged in business or other pursuits with heavy calendar commitments; two of them resided in California, two in Pennsylvania. The Court refused every request for a fixed trial date. Instead the Judge's clerk sporadically attempted to give telephone notice, on occasions, that the trial of the case would begin the very afternoon of the call or the following morning. The telephoned notice varied from several hours to several days. Obviously, it was impossible to have plaintiff's witnesses come from California and Pennsylvania on such short notice, even if they happened to be available when an unanticipated call came. Obviously, also neither counsel nor witnesses could maintain a totally clear calendar for weeks or months, subject to immediate trial of this case on telephone notice. Even when the Court did provide a trial date more than a few days in advance, it was always explained that the date was subject to change.

42 16. The case was set for trial on various dates in <sup>1974</sup> February and early March, with March 13 eventually set as the indicated trial date. On March 7, 1974, Arnold Stream, Esq., attorney for defendant, wrote the Court requesting an adjournment of several weeks due to a commitment he had in Florida (a copy of that request is annexed hereto as Exhibit 3). The Court granted Mr. Stream's request, and the case was then put on an on-again, off-again basis through mid-April, when Judge Level went on vacation. During the first part of May, I got in touch with all of plaintiff's witnesses, and obtained a schedule of their

availability for May and June." I then asked the Court, on approximately May 20, 1974 to set a firm trial date which would allow for plaintiff to assure the attendance of its witnesses. No response was received to that request. The next communication from the Court was in or about the second week of June 1974 when Judge Levet's law clerk called and said that the case would be called for trial in a few days. I told the law clerk, Mr. Goldman, that plaintiff's witnesses were not then available, since the Court had refused to give a fixed date as requested.

17. Several days later, Mr. Goldman notified me that the trial of this matter would be put over until the fall. In response to my plea, he told me that a date certain for trial would be given well in advance, and that that date would not be prior to October 1, 1974, barring extraordinary circumstances.

18. On or about September 6, 1974, I received a phone call from Mr. Coyne, then Judge Levet's clerk, instructing me that the case would be called to trial on Tuesday, September 10. After I protested that this was impossible, Judge Levet told me that the trial date would be September 19, 1974, unless I could state good reason why it should not be so scheduled. Thus, I wrote to the Court on September 10, 1974, explaining that three of plaintiff's witnesses, Messrs. Louis, Klein and Sinkler, had previous commitments which made it impossible for plaintiff to proceed on September 19. (A copy of that letter is annexed



hereto as Exhibit 1). I therefore requested that a date for trial be set in the first two weeks of October. The case was then set for trial on October 3. On or before that date, however, defendant's attorney, Mr. Stream, applied for an adjournment because he was about to enter the hospital for an operation. Adjournment at defendant's request, with plaintiff's consent, for that medical reason, was ordered, to October 29. When Mr. Stream's operation was delayed, and his recovery took longer than expected, the matter was adjourned without date until Mr. Stream's recovery.

19. At least once in January and once in early February, the case was called for trial. On each occasion, actual engagements of one or both counsel made it impossible to begin the trial. Then, on February 25, 1975, Mr. Coyne called my office to notify me that the trial would begin on March 4, 1975. I told Mr. Coyne that I would check to see if plaintiff's witnesses would be available. I also told Mr. Coyne that I had just learned from Mr. Stream that he was starting a trial which he expected to last through March 5, and therefore, he would not be available on March 4. Mr. Coyne then called me back later that day to say that he had talked to Mr. Stream, that Mr. Stream would be available on March 6, and that the case would begin on March 6, regardless of whether plaintiff's witnesses would be available on that date. Fortunately, all of plaintiff's witnesses were available for trial beginning on

March 6, and plaintiff was fully prepared to begin a trial on that date. On March 5, 1975 my associate, Edward Brill, spoke with Mr. Robert Smith, an associate of Mr. Stream's, who told Mr. Brill that Mr. Stream was still on trial and would not be available the following day. I proceeded to notify the Court of Mr. Stream's unavailability. The Court directed that the case was nonetheless to proceed to trial on March 6. I appeared in Court on March 6 fully prepared to begin the trial, with plaintiff's initial witnesses available in New York to appear in court as soon as their testimony would be required. The events of March 6, which transpired when Mr. Stream did not appear, are fully recorded in the official transcript of the proceedings in chambers, and are summarized above at Paragraphs 4 and 5.

20. The Court's determined refusal not to give a date certain for trial has caused this matter to founder in a state of constant uncertainty for over a year, without a trial being accomplished. The Court's refusal to grant the request of both parties for a date certain with reasonable notice before trial was clearly stated by the Judge's senior law clerk during the March 6 hearing:



"A [By Mr. Coyne] A week ago on Tuesday, I guess that was the 25th of February, I called both parties to give them a date certain which both had requested.

Q [By the Court] Was a date certain not given until then?

A No, it was not, because -- both parties asked for a date certain.

Q When did they ask for that?

A Many times through January. Every time we attempted to schedule this case for a trial both sides asked for a date certain.

Q That was Mr. Stream as well as Mr. Gartner?

A Right. And I indicated that that normally was not done. After they persisted, I approached the Judge and told them both sides requested it, so the Judge said, okay, give them March 4th at 10 o'clock."

(Tr., 14)

21. Clearly, the "date certain" of March 4, no more than that of April 21, which was set peremptorily against plaintiff for no apparent reason, never gave plaintiff the opportunity to arrange for a clear trial period as plaintiff requested, in which all witnesses would be available. Nevertheless, by happenstance, all plaintiff's witnesses were appropriately available on March 6, and the immediately succeeding days for a trial which would not proceed because of the unavailability of defendant's counsel. Now, however, because the Court persisted in setting a new trial date without giving plaintiff an opportunity

to ascertain the availability of its witnesses, one of the plaintiff's chief witnesses to the facts is unavailable to testify in person before the jury and his testimony can be presented only in a limited way by deposition. Plaintiff's two expert witnesses have only limited availability during the week of April 21, making the presentation of their testimony in a continuous, orderly sequence difficult, if not impossible. And now that plaintiff's other principal witness to the events in issue is medically unable to attend the trial, the Court proposes that counsel travel across the country to Los Angeles, California, on Saturday, take Mr. Louis' deposition, and return in time to begin the trial on Monday, April 21. Apart from the physical strain, such a schedule deprives plaintiff's attorney of the opportunity to begin the trial with any composure; makes it impossible to coordinate the presentation of the experts' testimony with the presently non-existent deposition of Mr. Louis, which may not even be transcribed by Monday, April 21; and forces plaintiff to present to the jury only deposition testimony of the events in question. In sum, to insist on proceeding to trial at this time, rather than to grant a three or four-week adjournment, is to deprive plaintiff of a fair trial.

22. Plaintiff therefore requests an adjournment of approximately one month, with the date for trial to be scheduled after an opportunity to check the availability of all witnesses. Counsel for plaintiff has been in actual readiness for trial for



over a year. Witnesses have been prepared, documents have been readied, and a trial memorandum is written. All plaintiff has ever requested is reasonable setting of the date for trial so that it might ensure the presence of its witnesses. This, the Court has been consistently unwilling to do.

23. Recognizing the broad discretion that a trial judge has in controlling his own trial calendar, and that the authority to decide whether a continuance should be granted is entrusted to the broad discretion of the trial judge, the Court of Appeals for this Circuit has nonetheless often stated that "a court must not let its zeal for a tidy calendar overcome its duty to do justice" Davis v. United Fruit Co., 402 F.2d 328, 331 (2d Cir. 1968); Peterson v. Term Taxi, Inc., 429 F.2d 888, 891 (2d Cir. 1970). In Peterson, the Court reversed the dismissal by the trial court of plaintiff's case after plaintiff and his attorney failed to appear for trial on Monday following telephone notice given by the clerk on Friday afternoon, stating:

"We reiterate that 'the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired.' Winston, supra, 415 F.2d at 621. [Winston v. Prudential Lines, 415 F.2d 619 (2d Cir. 1969)] The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such close inflexible attention to the docket. Whatever the merits of plaintiff's case may be, in our opinion justice required that he be given a fair hearing on his claim."

429 F.2d, at 891-92.

See, also, Alamance Industries, Inc. v. Filenes, 291 F.2d 142, 146 (1st Cir. 1961), cert. den., 368 U.S. 831 (1961).

It is respectfully submitted that plaintiff cannot have a fair hearing on its claims if it is forced to proceed to trial on April 21, 1975, and that therefore an adjournment of the trial date for approximately a month should be granted.

S/Murray Gartner  
MURRAY GARTNER

Sworn to before me this  
18th day of April, 1975

S/Edward Brill

EDWARD A. BRILL  
Notary Public, State of New York  
No. 45033-0  
Qualified in New York County  
Commission Expires March 30, 1978

ENFORCED:

Application for a continuance of this action is denied.  
So Ordered.

4/22/75

Richard H. Levet  
U.S.D.J.



EXHIBIT 1 TO MURRAY GARTNER'S AFFIDAVIT,  
TRANSCRIPT ON PROCEEDINGS ON MARCH 6, 1975  
NOT REPRODUCED.

UNITED STATES DISTRICT COURT

UNITED STATES COURTHOUSE

NEW YORK, N. Y. 10007

EXHIBIT 2 TO MURRAY GARTNER'S AFFIDAVIT

CHAMBERS OF

JUDGE RICHARD H. LEVET

March 6, 1975.

Netter, Lewy, Dowd, Fox,  
Ness & Stream, Esqs.  
660 Madison Avenue  
New York, N.Y. 10021

Attention: Arnold Stream, Esq.

Dear Mr. Stream: Re: Ajax Hardware v Industrial Plants Corp.  
69 Civil 1900

Mr. Robert Smith (not admitted to this court) appeared this morning to make an application for an adjournment of the above-entitled case on the ground that you were engaged in a defendant's non-jury trial before a state judge and could not be here. I attempted to arrange for the selection of a jury. Mr. Smith indicated that if I required jury selection the defendant might waive the peremptory challenges. Neither Mr. Gartner nor I favored such a proceeding with no one here from your office who is a member of this court even to enter into any stipulation. After some discussion by Mr. Gartner, Mr. Smith and myself, this is my determination:

Mr. Gartner informed me that he has certain witnesses here from California who must return within a day or so and cannot stay to meet any immediate adjourned date. Consequently, at the request of Mr. Gartner and with no objection from Mr. Smith I adjourned this case to April 21, 1975 at 10:00 A.M. This is a fixed and peremptory date and both sides must be ready at that time; otherwise, the case will either be dismissed against plaintiff or a default ordered against defendant.



UNITED STATES DISTRICT COURT

UNITED STATES COURTHOUSE

NEW YORK, N. Y. 10007

CHAMBERS OF  
JUDGE RICHARD H. LEVET

-2-

This is done upon terms: Mr. Gartner is to communicate with the court stating the approximate amount of two round trip tickets from California to New York, and if this sum is reasonable I shall direct that defense counsel pay plaintiff's counsel the amount so determined.

After both sides had asked for a set date and it had been given to them and each had assured me that he would be available and ready at the date fixed, your conduct has been anything but pleasing to me and I believe that it might very well have been appropriate for me to enforce sanctions for you to pay into this court. I shall not allow any repetition of this tactic.

I am sending a copy of this letter to Mr. Gartner.

Very truly yours

(SGD) RICHARD H. LEVET

United States District Judge

CC: Murray Gartner, Esq.

EXHIBIT 3 TO MURRAY GARTNER'S AFFIDAVIT

NETTER LEWY DOWD FOX NESS & STREAM

CLAUDE LEWY

PARIS AND NEW YORK OFFICES

RICHARD NETTER  
IRVING FOX  
HECTOR G. DOWD  
THEODORE NESS  
MARIE LOUISE STERN  
ARNOLD C. STREAM  
JOHN B. ALFIERI  
ABBOTT GOULD  
ALAIN DECOMBE  
JULES L. WACHT  
JOHN L. GOLDSTONE  
CARL F. AXELROD  
LEE EPSTEIN  
DAVID J. GLINERT  
EDWARD M. BERMAN  
PAUL FROHMAN

ATTORNEYS AND COUNSELORS AT LAW

660 MADISON AVENUE - NEW YORK, N. Y. 10021

212/TEMPLETON 8-5335

(NETTER & NETTER)  
(1916-1962)

PARIS OFFICE  
53, RUE LA BOETIE,  
PARIS, VIII<sup>E</sup>  
ELY. 15. 81

CABLES  
NETTERLAW  
CLAUDLEX NEW YORK

LEXCLAUD PARIS

A. WALTER SOCOLOW  
COUNSEL

March 7, 1974

Honorable Richard H. Levet  
United States District Judge  
U.S. Courthouse  
Foley Square  
New York, N.Y.

Re: Ajax Hardware v. Industrial Plants  
69 Civ. 1900

Honorable Sir:

We have been in a state of actual readiness to proceed as counsel for the defendant since February 19th subject of course to the convenience of this Court. We had been given to understand, however, that this case would actually begin the last week in February. If it had, it of course would have been over by now.

As the situation now stands, I find myself in a difficult situation. Early in February of this year I was informed by the State Attorney for the Western District of Florida that a case in which I had been engaged to assist him in preparing was scheduled to be presented to the grand jury in March and a murder indictment sought at that time. Both my testimony and my assistance are required at the grand jury session which was fixed at my request for March 21st and March 22nd. When these arrangements were made, I expected that the action before this Court would long have been completed.

As matters now stand, however, since the trial here could not be scheduled for this week, I may have a very serious conflict unless it starts on Monday morning of next week; this for the reason that my engagement with



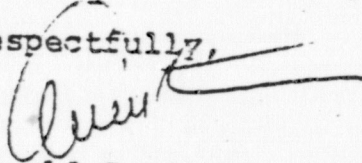
Honorable Richard H. Levett

2.

the State Attorney requires me to fly to Naples, Florida on Monday afternoon to review records, gather witnesses and statements (already taken) and take care of the other essential prerequisites to a lengthy grand jury presentation, efforts which will take up my time on the 19th and 20th, the two days before the grand jury session.

I am keenly aware of my obligations to this Court to keep myself in a state of readiness in the pending case and not to take on any new engagements which might preempt my time. I have carefully followed that injunction. On the other hand, if I am not able to start this trial on Monday and thus assured that it will be completed by Friday, it will create an enormous problem with the Florida authorities because witnesses have been assembled and a special grand jury scheduled in reliance upon my availability. In view of the fact that I have kept my readiness to start this case on a 24-hour notice basis from day to day since mid-February, I humbly request this Court's indulgence, if we are not able to pick a jury and proceed promptly on Monday morning.

Respectfully,

  
Arnold C. Stream

cc: Poletti Freidin Prashker  
Feldman & Gartner

EXHIBIT 4 TO MURRAY GARTNER'S AFFIDAVIT

September 10, 1974

Hand Delivery

Hon. Richard H. Levett  
United States District Judge  
U.S. Court House  
Foley Square  
New York, New York 10007

Re: Ajax Hardware Corporation v.  
Industrial Plants Corporation

Dear Judge Levett:

In accordance with your instructions last week, I immediately tried to get in touch with the plaintiff and its prospective witnesses in the above matter to determine whether they could proceed to trial on September 19, 1974 as you had directed. Two of the witnesses live in California and two in Pennsylvania.

In June of this year, I had been told by your then law clerk that the case would be put over to the fall and that we would be given a date certain for the beginning of the trial, well in advance, so that both parties could arrange for the necessary witnesses to be available on that date and the anticipated succeeding dates of the trial. Your law clerk also told me that it was extremely unlikely that the case would be set for any date before October 1. I therefore communicated this information to Mr. Norman Louis, the then President of the plaintiff corporation, and to Mr. Howard Klein, one of the plaintiff's principal witnesses.

I heard nothing further from the Court until last week when your present law clerk called to tell me that you proposed to start the trial on September 10. Subsequently you telephoned me to say that the trial would start on September 19 unless there was a good reason why it should not.



Hon. Richard H. Levat  
September 10, 1974  
Page Two

Mr. Louis has now written me that, because of his understanding in June that the trial would not start earlier than October, he had in the past three months made certain commitments which will make it impossible for him to be in New York to testify and to assist me in the conduct of a trial beginning on September 19. The Jewish High Holy Days, which Mr. Louis intends to observe at his home in Los Angeles, California, occur from the evening of September 18 to the evening of September 19, and from the evening of September 25 to the evening of September 26. In addition, Mr. Louis, as President of the American Society for Technion in the West, must preside at a special tribute dinner in Los Angeles on September 21 for the presentation of the Albert Einstein Award. He must be present at meetings on September 20 to prepare the procedures and presentations for that dinner. Mr. Louis has also committed himself to speak in Los Angeles before the Physicians Support Group of the Technion Medical School on September 22.

Mr. Howard Klein, as President of the Standun Company, must be present in Los Angeles for the period September 20-25 to participate in negotiations for his company with a number of European business men who are coming to the United States on those dates specifically for those negotiations. Mr. Arthur Sinkler, one of plaintiff's expert witnesses is unavailable for a trial on September 19 because of a Board Meeting of the Pennsylvania State College and University Directors. Both Mr. Louis and Mr. Klein will be able to defer any other commitments and make themselves available for the trial during any part of the first two weeks in October; Mr. Sinkler will also be available during that period.

In view of the circumstances stated in this letter, to require the trial to proceed on September 19 would result in great prejudice to the plaintiff. I respectfully request therefore that the Court designate a period in the first two weeks of October for the conduct of this trial.

Respectfully yours,

Murray Gartner

cc - Edward Berman, Esq.  
Arnold C. Stream, Esq.

bc - Mr. Norman Louis

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

69 Civ. 1900

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Arnold C. Stream sworn to the 2nd day of May, 1975, and upon the prior pleadings and proceedings heretofore had herein, defendant will move this Court before the Hon. Richard H. Levet, at the United States Courthouse, Foley Square, New York, New York, in Courtroom 2703, on the 19th day of May, 1975 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard:

(a) for an order directing that judgment n.o.v. be entered for the defendant on Count II in the above action pursuant to Rule 50(b) of the Federal Rules of Civil Procedure on the ground that the evidence presented



by the plaintiff on that count was insufficient as a matter of law; or

(b) an order pursuant to Rule 59 of the Federal Rules of Civil Procedure setting aside the verdict of the jury on Count II as contrary to the clear weight of the evidence; or

(c) an order pursuant to Rule 59 of the Federal Rules of Civil Procedure setting aside the verdict of the jury on Count II and directing a re-trial of all issues on that count on the ground that the said verdict was the result of a compromise among the jurors; or

(d) an order pursuant to Rule 59 of the Federal Rules of Civil Procedure setting aside the verdict of the jury with respect to Count I and Count II on the ground that those verdicts are incompatible and reflect an abuse of power by the jury; or

(e) an order pursuant to Rule 59 of the Federal Rules of Civil Procedure setting aside the verdict on Count II and ordering a new trial on the ground that the said verdict was the result of undue empathy and passion of the jury which in the interests of justice should not

be permitted to stand.

Dated: New York, N. Y.  
May 8, 1975

Yours, etc.

MONROE CHAZEN & STREAM

By 

Arnold C. Stream, a member of the firm  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1880

TO: POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING CORPORATION,	:	69 Civ. 1900
	:	
Plaintiff,	:	<u>AFFIDAVIT</u>
-against-	:	
INDUSTRIAL PLANTS CORPORATION,	:	
Defendant.	:	

-----X

STATE OF NEW YORK                    )  
  )  
COUNTY OF NEW YORK                 ) ss.:  
  )  
SOUTHERN DISTRICT OF NEW YORK)

ARNOLD C. STREAM, being duly sworn, deposes and says:

Preliminary Statement

1. This affidavit supports an application in behalf of the defendant made under Rules 50 and 59 of the Federal Rules of Civil Procedure seeking the following relief:

(a) an order directing that judgment n.o.v. be entered for the defendant on the ground that the

evidence presented by the plaintiff on Count II was insufficient as a matter of law; or, in the alternative

(b) an order setting aside the verdict of the jury on Count II for the reason that it is contrary to the clear weight of the evidence, and directing a new trial on that count; or

(c) as an alternative to the foregoing relief, an order setting aside the verdict of the jury on Count II and directing a new trial of all issues affecting that count for the reason that the verdict rendered by the jury thereon was a transparent compromise which tainted the entire adjudicative process of the jury respecting the same; or

(d) an order\* setting aside the verdict of the jury with respect to Count I (breach of contract) and Count II (negligence) because the verdict as to those counts is incompatible upon its face and therefore reflects an abuse of power by the jury; or

(e) an order setting aside the verdict on Count II and ordering a new trial thereon for the reason that it is in the interest of justice and called for as a

---

\*This and subsequent relief requested by us will become moot if our application under section (a), (b) or (c) is granted.



requisite of the fair administration of the trial system in the federal establishment that recognition be given to the clear likelihood that the verdict in favor of the plaintiff on this count was the consequence of frequent expressions by counsel for the plaintiff throughout the trial in the presence of the jury that he was the personal target of unfair, ungenerous and unequal treatment by this Court and counsel for the defendant; all of which had a reasonable likelihood of improperly evoking the empathy and passion of the jury.

2. The trial of this action concluded at 3:15 p.m. on May 1st when the jury rendered a verdict in favor of the defendant on Counts I (contract) and III (fraud), but rendered a verdict in favor of the plaintiff on Count II (negligence).

3. The plaintiff sought liquidated damages on all counts of \$161, 895.75. The jury awarded damages to the plaintiff on Count II of exactly \$70,000.

4. We shall deal with each aspect of this motion in order.

The Defendant Is Entitled  
To Judgment On Count II  
As A Matter Of Law

5. Viewing the evidence of the plaintiff in the most favorable light, the fatal flaw in its case is that there is no legal nexus between the defendant's appraisal and the plaintiff's damages, even if we assume, arguendo, that the defendant was somehow negligent. This for the reason that the plaintiff knew the kind of appraisal it was to receive, and it knew what kind of appraisal it did receive.

6. If the defendant had been paid to prepare an appraisal which contemplated a forced sale, item-by-item, and if the values reflected in the appraisal prepared by the defendant contemplated, or should have contemplated, a forced sale, then this case would be in a different posture. But none of those questions are presented in this case.

7. The only question presented by the plaintiff was whether the defendant's in-place appraisal could have been the proximate cause of the plaintiff's damages at a forced sale.

8. We reiterate our position that as a matter of law there is no causal relationship between the plaintiff's damages



and the defendant's preparation of the in-place appraisal, and we therefore renew at this time the motion which we made at the trial for a directed verdict for the defendant on Count II.

The Verdict On Count II  
Is Contrary To The Clear  
Weight Of The Evidence

9. This Court of course has the prerogative to set aside the verdict on Count II even though it may have been supported by substantial evidence where nevertheless it is contrary to the clear weight of the evidence; and this Court can do this even though it determines that the evidence was sufficient to preclude the directed verdict. (The basic legal authority empowering the Court to do this is set forth in our accompanying memorandum of law.)

10. The proof and evidence is too fresh in mind, we are sure, for us to have to restate it in relevant part upon this point. As we see it, however, in its overall aspects the only possible issues of fact raised by the proof in this case related to the primary question: What were the terms of the agreement between the parties? A sub-issue was presented: Did the defendant perform that agreement according to its terms?

11. All of the proof without one single conflicting statement or contradicting document established not by a preponderance of credible evidence but beyond even a shadow of doubt that at the very least Ajax knew what kind of an appraisal it got and paid for. Ajax knew that the appraisal did not reflect the forced sale liquidating values and that if it really needed that data, it could not be extrapolated from the fair market value, in place, appraisal which the defendant delivered. That was the reason we argued to the jury that if there was a breach, it consisted of the preparation of a wrong appraisal, for which the plaintiff had every right (if it could prove that it had not ordered the kind of appraisal it got) to seek damages; but those damages would have amounted to nothing more than the fees which the defendant charged for the job. What is most important to note is that since the plaintiff knew that it had not received a forced liquidating value appraisal, it simply could not have relied upon that appraisal for liquidating values and, if it did, it had no cause of complaint against the defendant for that reliance. In any event, as we noted previously, it is clear that the plaintiff did not rely upon the appraisal for those liquidating values, since the facts and documents in the record establish as a matter of law that there was no causal relationship between that fair market, in-place,



appraisal, on the one hand, and prices realized at a forced sale at public auction, item-by-item, 14 months later.

12. In these circumstances, even if we were to assume, arguendo, that the plaintiff proved conclusively (which it didn't) that the appraisal was erroneous, carelessly done, inaccurate, fraudulent, malicious, malignant, diseased, or rotten to the core, the plaintiff still failed to establish by any evidence support for its contention that it was justified in relying upon the in-place appraisal prepared by the defendant as a viable vehicle for determining the value of the machinery and equipment for a forced sale in liquidation under any conceivable circumstances. Since the plaintiff knew this, it could not be treated as a legal predicate for damages based upon any theory or cause of action. That the plaintiff knew this is clear from the correspondence written by the plaintiff's officials (Klein and Louis) to defendant, and that is irrefutable.

13. The fact that the plaintiff requested liquidating values in addition to the appraisal proves this conclusively.

14. The plaintiff, recognizing this fundamental flaw in its case, suggested that the 60% figure below which Thaler said it was "inconceivable" that the values would go dealt exclusively

with the appraisal figures to which its telegram referred. By no possible contortion can the testimony or documents be read to mean that Thaler was speaking of a forced sale at liquidation. Such a construction is simply contrary to the clear weight of the evidence.

15. There is therefore absolutely nothing in the record which entitled the jury to find for the plaintiff on the negligence count with respect to an appraisal which did not and could not as a matter of fact and as a matter of law provide any kind of a bridge from in-place market values of a plant capable of operation as an integrated and complete factory and item-by-item sales of each machine as second-hand machinery 14 months later at a forced liquidation at public auction.

16. These are the reasons we respectfully suggest that there is no escaping the duty of this Court to set aside the verdict on Count II as completely contrary to the weight of the evidence.

The Verdict Was The  
Result Of An Improper  
Compromise

17. The liquidated damages in this case were \$161,895.75. The jury awarded damages to the plaintiff on Count II in the round



amount of \$70,000. As we demonstrate in the accompanying memorandum of law, this disparity between the undisputed amount to which the plaintiff would be entitled and the amount of damages returned by the jury in this negligence count conclusively demonstrate that the jury compromised the issues of liability and damages.

18. It would be supererogation for us to say anything more than that this was a case in which liability was hotly contested. In these circumstances, it is evident that the jury was unable to reach an unanimous verdict on the issue of liability. The result of this compromise by the jury was to deprive the defendant, indeed to deprive both litigants, of the right to have the negligence count determined by a jury in accordance with our trial system in the federal establishment. For this reason, we ask that the verdict on Count II be set aside and that a new trial be directed on all issues in that count.

The Verdict Was Inconsistent  
And Incompatible

19. It is equally clear that if judgment is not rendered for the defendant on Count II (for if it is not rendered, this whole point becomes moot) there is an inconsistency in the verdict which in effect amounts to an abuse of its power so that this Court

should properly exercise its discretion in sustaining our motion for a new trial on Counts I and II.

20. The inconsistency and incompatibility stem from the verdict on Count I which found that there had been no breach of contract by the defendant and the verdict on Count II which found that the defendant had been negligent.

21. If anything in the entire trial process was made clear by counsel for the plaintiff, it was the fact that the plaintiff's claim of breach of contract was not as narrowly stated in the complaint but as more broadly stated in the complaint as amended by the contentions presented by the plaintiff in the pre-trial order and the issues thereby raised. Thus, Paragraph 3(a)(1)(ix) of that pre-trial order states the plaintiff's contention that the defendant breached the contract because --

" \* \* \* [defendant] failed to make an accurate appraisal for plaintiff and failed to make such appraisal in a careful and diligent manner; defendant was negligent in its appraisal and report in that it wholly and grossly failed to exercise the usual and ordinary care, prudence and industry used by appraisers in determining values \* \* \* ."

22. Plaintiff's counsel in his opening statement and



again in his summation asked the jury to consider that the breach upon which the plaintiff relied was occasioned by these same elements of negligence. The plaintiff's expert proof and the testimony read during the plaintiff's case from the deposition of Jessie Thaler was claimed to have supported the same premise.

23. The plaintiff's requests to charge, granted as charged, called for an instruction that every contract carried a duty to perform with care and skill, "and a willful negligent failure to observe any of these conditions is a breach of contract." (§11)

24. This Court charged consistently with the quoted instruction.

25. Perhaps of greatest significance was this Court's additional instruction to the jury in response to its first question calling for a redefinition of breach of contract, which was given, in response to the particular request of plaintiff's counsel that its initial response to the question was inadequate. It was then that this Court recalled the jury to the courtroom on its own motion and adding to the original redefinition given in response to the question, stated that there was an "overlapping"

of negligence and of breach of contract.

26. Since the jury rendered a verdict in favor of the defendant on the first count, thereby squarely holding that there had been no breach of contract, it was a contradiction to find for the plaintiff on the second count and thereby adjudicate that the defendant was negligent. The jury could have found in favor of the plaintiff on Count I, determining that the defendant had breached the contract, without finding in favor of the plaintiff on Count II; for the breach may have been upon grounds other than negligent contract performance. However, the jury could not without inconsistency find on the one hand that there was negligence and yet not find on the other hand a breach of contract; this, for the reason, that the whole theory of the plaintiff's case was that if there was negligence then there had to be a breach of contract. For the very negligence was claimed as a breach.

27. To sum up the point, the jury could only render a consistent verdict by finding in favor of the plaintiff on Count I alone or on Counts I and II. It could not consistently render a verdict, however, in favor of the plaintiff on Count II but not on Count I.



28. This inconsistency not only renders the verdict a nullity, it further demonstrates the spirit of compromise which tainted the deliberative processes. Although it is not necessary to deduce this -- the fact of incompatibility is a mandate in and of itself to set the verdict aside on Counts I and II -- it is nonetheless a fair deduction that the jury thought that the "safest" way to reach a compromise was to strike a figure on negligence in the mistaken belief that somehow the measure of damage was different for negligence than it was for breach of contract. Of course it wasn't, and the charge made it completely clear that the measure of damage was the same on all three counts except for the possibility that punitive damages might have been added.

29. For these added reasons we ask that the verdict on Counts I and II be set aside and a new trial ordered on those counts.

The Fair Administration  
Of Justice Requires A  
New Trial

30. There is no point in a reiteration at this point

of the multitude of exceptions taken and objections made by counsel for the plaintiff to not only the rulings of this Court but to its general conduct of the trial and the denial to the plaintiff of an opportunity to secure meaningful testimony from Mr. Norman Louis. All these matters are sufficiently fresh in mind to require no reiteration now. The record is what it is.

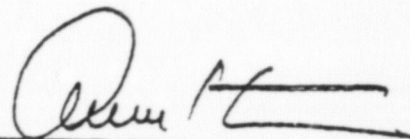
31. The opportunity is now presented to this Court, by virtue of the singular verdict reached by the jury, to give some consideration to the possibility that the compromise which the jurors reached reflected an empathy with counsel for the plaintiff and an accommodation by the jury because of the activities alluded to above which counsel for the plaintiff again and again made certain were brought to the conscious awareness of the jury panel.

32. Since sympathy, emotion and similar attitudes are improper motivations for jury action, and since there is no way of making certain that the verdict rendered in this case, certainly a compromise and certainly inconsistent upon its face, was not occasioned by these legally irrelevant circumstances, it would seem to us that a decent regard for the fair administration of justice and the trial process in the federal establishment warrants



setting aside the verdict of the jury on the first two counts and the judgment entered thereon, and directing a new trial on those counts.

WHEREFORE, I respectfully pray that this application be granted in the respects set forth above.



Arnold C. Stream

Sworn to before me this  
2nd day of May, 1975.

*Robert Gary Smith*

ROBERT GARY SMITH  
Notary Public, State of New York  
No. 24-4518697  
Qualified in Kings County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

69 Civ. 1900 (R.H.L.)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Murray Gartner sworn to the 12th day of May, 1975, and upon the prior pleadings and proceedings heretofore had herein, plaintiff will move this Court before the Hon. Richard H. Levet, at the United States Courthouse, Foley Square, New York, New York, on the 27th day of May, 1975, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard:

(a) for an order directing that judgment n.o.v. in respect of damages be entered for the plaintiff in the above action in the sum of \$161,895.75, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure on the ground that the damages awarded by the jury were insufficient as a matter of law; or

(b) an order pursuant to Rule 59 of the Federal Rules of Civil Procedure setting aside



the award of damages and ordering a new trial limited to damages on the ground that the award of damages was against the weight of the evidence and should not be permitted to stand; and

(c) an order, including in the judgment to be entered herein statutory interest under the laws of the State of New York computed on the amount awarded as damages from May 20, 1968, on the ground that plaintiff is entitled to such interest as a matter of law, in this diversity action.

Dated: New York, New York  
May 12, 1975

Yours, etc.

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By/s/ Murray Gartner  
A Member of the Firm  
Attorneys for Plaintiff  
777 Third Avenue  
New York, New York 10017  
Tel: (212) 688-3200

TO: MONASCH CHAZEN & STREAM  
Attorneys for Defendant  
733 Third Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

69 Civ. 1900 (R.H.L.)

-against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

AFFIDAVIT

-----X  
STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

MURRAY GARTNER, being duly sworn, deposes and says:

1. As trial counsel for plaintiff Ajax Hardware Manufacturing Corporation (hereinafter "Ajax"), I make this affidavit in support of Ajax's motion for an order directing entry of judgment for \$161,895.75 notwithstanding the verdict of \$70,000, and, in the alternative, for a new trial on the issue of damages.

2. The Court's Careful Instructions Separating Liability and Damages. The jury, in separate findings, (1) found defendant liable to plaintiff for negligence in its performance of the appraisal it had contracted to do, and (2) assessed the damages for that negligence at \$70,000. The



proceedings leading to that result compel the inescapable conclusion that the jury followed the clear, careful and specific directions of the Court to determine liability first, and, if they found liability on one of the three causes of action, then and only then, to consider and determine the question of the amount of damages.

3. Jury Believed it had Discretion on Damages.

It is apparent also from the course of the proceedings, defendant's summation, and the Court's instructions to the jury, that the jury believed that it was free to determine damages in any amount provided that amount did not exceed \$161,895.75.

4. Damages were Liquidated. At the close of all the evidence, however, the only proof of damages was in the fixed and liquidated amount of \$161,895.75, regardless of whether the jury determined the defendant to be liable on one, two or all three of the causes of action. Defendant now, in its motion papers received on May 9, 1975, concedes the amount of damages on any cause of action was fixed and liquidated at \$161,895.75. It follows that the issue of the amount of damages should not have been submitted to the jury, and the Court should now rectify the jury's error in thinking that it was free to determine an amount for damages less than \$161,895.75.

5. Defendant did not Concede Damages were Liquidated at Trial. Although defendant now concedes that the amount of damages was fixed and that the jury had no discretion to award a lesser amount, defendant took a completely different position during the trial. Defendant refused to stipulate during the trial that the amount of plaintiff's damages was fixed, in the event the jury found liability. It also refused to stipulate even that Ajax had paid the lending bank the balance of the Time & Micro loan as it was required to do under Ajax's guarantee agreement. Only after plaintiff had Mrs. Dee Taylor, Ajax's Accounting Supervisor, fly to New York from Los Angeles, California to be ready to testify on Monday, April 28 as to the exact computation of plaintiff's damages, did Mr. Stream consent to allow in evidence certain documents showing Ajax's payment to the bank. These documents, which came in without any explanatory testimony, showed payment by Ajax to the bank of \$163,270.70.\* Nevertheless, in its summation, defendant strongly suggested that the amount of damages could be reduced by either of two speculative amounts, i.e., any amount which plaintiff might have recovered in a suit against the Time & Micro company or any amount which plaintiff might have recovered from the Government as a settlement on a putative contract to manufacture fuses.

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\* Plaintiff's Exhibit 22, the Advice of Charge Debit from the First Western Bank and Trust Company, dated May 20, 1968, shows a total debit to Ajax's account of \$163,270.70 for "payoff of Time & Micro Instruments loan". Plaintiff's Exhibit 24, the Subrogation Receipt from the Bank, also dated May 20, 1968, similarly acknowledges a payment by Ajax of \$163,270.70. There was no evidence submitted to the jury showing subsequent refund by the bank of \$1,374.95.



6. Jury Left with Mistaken Belief in Discretion of Damages After Summations. Mr. Stream concluded his summation to the jury approximately at 10 minutes of noon on April 30, 1975. By the Court's direction, I began the summation for the plaintiff immediately, under instructions to conclude before recess for lunch. The Court declined to increase the time allotted to me for an additional 15 or 30 minutes, as I requested. The result was that, among other things, I was unable to address myself to the question of damages, or to correct the completely improper suggestion which defendant's attorney had left with the jury that they might decrease the amount of their award for damages in some unspecified and speculative amount.

7. The Court's Charge on Speculative Reduction of Damages. Following the late lunch recess, the Court began its charge to the jury at about 3 P.M. and continued until approximately 4:20 P.M. when the jury retired to consider its verdict. Responsive to my request that the Court address itself to Mr. Stream's improper remarks in his summation about speculative reduction of the amount of damages, the Court did instruct the jury, some three or four hours after Mr. Stream's statement, that it should disregard any comments about possible reduction of the amount of damages by any amount which Ajax might have recovered as a settlement on a possible government contract. The Court, doubtless by inadvertence, did not instruct the jury that it should similarly disregard comments about possible reduction of the award for damages by a speculative amount which Ajax

might have recovered by suit against Time & Micro,

8. The Court's Charge on Maximum Damages. Moreover, the Court in its charge instructed the jury that

"If you should find that the plaintiff is entitled to compensatory damages, your award cannot exceed the total sum claimed for such damages, which is \$161,895.75". (Transcript of Charge to Jury, p. 20).

The charge inadvertently left the impression with the jury that they had discretion to award any amount, as long as it was not over \$161,895.75. This impression was reinforced by the special verdict form which asked the jury in Question 4, "To what award is plaintiff entitled, if any, for compensatory damages" and contained a blank space for the jury to fill in whatever number it chose. The special verdict form was approved before the closing argument of defendant, which first injected spurious issues as to possible reduction of plaintiff's damages (see Paragraph 5, above) and before the Court's charge.

9. Jury's Exercise of Mistaken Discretion as to Damages does not Establish Compromise on Liability. Under these circumstances, it is almost incredible that defendant should now urge that the only explanation for the jury's return of a verdict of \$70,000 as the amount of damages is that they compromised on the issues of liability and damages. On the contrary, it is absolutely plain that the jury returned a verdict of a diminished



amount of the liquidated damages for five reasons:

(a) the questions in the special verdict form given to the jury were approved at the end of the day on April 29, 1975 before the summations and in the absence of any concession by the defendant, at that time, that there was no dispute about the liquidated amount of the damages. Question four, therefore, specifically assuming a prior finding of liability, nevertheless read:

"To what award is plaintiff entitled, if any,  
for compensatory damages"

and contained a blank line for the jury to fill with a number.

(b) Mr. Stream's summation to the jury the following morning plainly invited them to deduct any unspecified amount which they might think the plaintiff might have recovered either from the Government or from Time & Micro. In the face of that invitation, it is disingenuous for Mr. Stream now to attach any significance to the rounded nature of the figure which the jury did return. Clearly, the jury could not deduct a specific dollars and cents figure from the \$161,895.75 in response to the improper invitation to deduct one or two or both unspecified and speculative recoveries by Ajax from either the Government or Time & Micro. The Court's later instruction to disregard Mr. Stream's invitation covered only half of it; and since it came three or four hours later may not have been associated in the jury's mind with the specific suggestion of reduction in the amount of damages by speculation about other recoveries.

(c) The Court's charge to the jury that they could not award more than \$161,895.75 necessarily, albeit unintentionally, left the impression that the jury might award less.

(d) The evidence of the liquidated damages, plaintiff's Exhibit 22, is a debit memo from the bank to which Ajax had guaranteed the Time & Micro loan. Defendant now refers to that exhibit (Pl. Ex. 22) and the subrogation receipt (Pl. Ex. 24) as resolving the matter of damages "on what nearly amounted to a stipulation" (Def. Br., p. 18). Those documents, however, show the figure as \$163,270.70. The pre-trial order explains that Ajax had received a refund of \$1,374.95, reducing its actual loss to \$161,895.75. That latter figure was the figure which the Court instructed the jury was the limit of the damages. Again, without any explanation from plaintiff's counsel or the Court as to the reason for the discrepancy between the figure appearing on plaintiff's Exhibit 22 and the figure given by the Court in its charge, the jury may have been reinforced in its belief that they could further reduce the proved damages.

(e) The jury thus was left without any clear idea of how they were to compute damages from all of the many figures that had been introduced in evidence and without specific instruction that if they found liability, there was no contest about the amount of the damages. Indeed it is only now that defendant concedes, or rather, urges that there was no contest about the amount of the damages. It is impossible to determine what conflicting ideas each of the jurors might have had about how damages were to be measured. It is entirely possible that jurors reached different figures in their computation of damages



and then agreed to compromise as to those figures. Such a process, however, is a far cry from any unwarranted assumption that the jury disobeyed the instructions of the Court and did not find liability first, but compromised liability and damages in a one-step process.

10. The Jury was Plainly Instructed to Determine the Issues of Liability First. The Court clearly and properly instructed the jury that it was to consider the issue of damages only if it had first resolved the question of liability by finding that defendant was liable on one or more of plaintiff's claims. The Court, in its charge, stated explicitly that:

"The mere fact that I speak of damages, ladies and gentlemen, does not indicate whether or not damages should be awarded. You must determine this question of liability first. If you find that there is no liability, then there is no reason or basis for the consideration of damages."  
(Charge of the Court, p. 18) (Emphasis added.)

The special verdict form, moreover, instructed the jurors plainly that they were to proceed from Question to Question until they completed the first page. At that point, the form directed:

If your answer to any one or all of question 1, 2 and 3 is "Yes," go on to part II - Damages.

If your answers to questions 1, 2 and 3 are "No," omit part II and sign the Special Verdict on the last page.

(Ct. Ex. 2)

11. The Jury Plainly Found Liability First, as Instructed. Not only is there no warrant for assuming that the jury did not find liability first as instructed by the Court and then proceed to the consideration of damages, but the events concerning the jury, insofar as they are known (see paragraph 12, below), demonstrate that the jury precisely followed the Court's instructions. It therefore does not matter how the jury arrived at its figure of \$70,000 as its assessment of damages. Both parties are agreed that the amount of damages was liquidated and there was no discretion in the jury to find a different amount. It follows that the Court should now rectify the jury's misunderstanding of its instructions on the damages question and enter judgment for the agreed liquidated amount, plus interest.

12. The Jury First Determined the Breach of Contract Question. The demonstration that the jury followed the Court's instructions to find liability and damages sequentially inheres in the record of what it did. On April 30, 1975, the jury was out for only half an hour, when it was allowed to go home by the Court. It returned the following day and resumed its deliberations at 10 o'clock. Approximately 15 minutes later, the jury asked the Court "for an explanation from you as to what constitutes a breach of contract" (Ct. Ex. 3), the first question on the form of special verdict they were considering. The Court's charge tersely explained that breach of contract was failure to perform a contract as agreed. I asked the Court, after the jury



had retired again, to reinstruct the jury in accordance with the Court's original instruction that negligence in the performance of a contract was also a breach of contract. Mr. Stream strenuously objected to any additional instruction. The Court, however, called the jury back and instructed them as follows:

"I feel obliged to perhaps remind you of another factor. I believe I answered your question adequately as to what was a breach of the contract. I also charged you on negligence in the performance of a contract and there is a certain degree of merging or overlapping in that with the statement which I gave you and that is all I have to say and you may retire."

(Tr. May 1, pp. 4-5).

13. The Jury Then Determined Negligence. Following the Court's instruction on breach of contract, nothing tends to show that the jury did anything but find that the defendant had performed whatever contract it had agreed to (we do not know whether it accepted the plaintiff's version of that contract or defendant's version), and also that defendant's performance was negligent. Not knowing whether that negligence overlapped breach of contract to that "certain degree" which the Court had charged would permit a finding of breach of contract, the jury conservatively found no breach of contract. It plainly found that there was negligence. Of course, if it had recalled the Court's original instruction that negligence in the performance of this contract was breach of contract - and it is obvious

that it did not recall that instruction since it found it necessary to come back and asked to be charged again on the scope of the meaning of "breach of contract" - the jury would have been bound to find breach of contract as well as negligence. There is nothing inconsistent in the verdict on the first two questions returned by the jury in the light of the last instruction which it received on the meaning of breach of contract.

14. The Jury Found No Fraud. The jury then evidently did not find the requisite proof of fraud and so answered the third question, "No."

15. Thereafter the Jury Reported Deadlock and, Within Ten Minutes, A Unanimous Verdict. It seems apparent that having determined the issues of liability, the jury then began to consider the figure which they thought they had discretion to enter in the blank left opposite Question 4. It reported to the Court at approximately 3 P.M. on May 1, 1975, in substance, that it had not agreed by unanimous vote.\* The Court instructed the jury to continue their deliberations after suggesting that perhaps without compromising its own convictions, the minority could give further consideration to the views of the majority. In less than ten minutes the jury returned with its unanimous

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\* The Court did not read the note, Ct. Ex. 4, to counsel, but summarized its contents as stated above.



verdict. It is really contrary to experience of human nature to believe that any one or two jurors who had felt strongly enough in favor of the defendant about the issue of liability at 3 o'clock to have caused the jury to report to the Court that it was deadlocked, would, in the space of ten minutes, reverse their firmly held conviction about lack of liability and join in so substantial a verdict (\$70,000) in favor of the plaintiff. On the contrary, everything in the record shows that the jury followed the Court's instructions, found liability first and, then, because of its misunderstanding or its mistaken belief that it could fix damages in any amount less than \$161,895.75 and because of its uncertainty about how to fix that amount, found itself in apparently hopeless disagreement about the amount of damages. Having been urged by the Court to reconsider those differences, it returned immediately with a round figure on damages.

16. The Question of the Amount of Damages Should Not Have Gone to the Jury. Since defendant now concedes that there was no contest about the amount of damages to be awarded if the jury found liability, it is not only the right but, respectfully, the duty of the Court to do what it would have done if defendant's concession about the liquidated nature of the damages had been made before the case went to the jury. In that event, no question about amount of damages would have been submitted to the jury; and on the jury's finding of liability, the Court would have entered the conceded liquidated amount of damages. Such a revision of a jury verdict when there is no question of fact

about a specific issue wrongly decided by the jury is precisely the function of Rule 50(b) of the Federal Rules of Civil Procedure. In compliance with that Rule, plaintiff made a motion for a directed verdict at the end of all the evidence on April 29, 1975, and conformably to the Rules, judgment for the undisputed amount of damages should now be entered.

17. There is no Reason for a New Trial. Alternatively, plaintiff has moved for a new trial on the issue of damages. Defendant concedes, however, in its moving papers received on May 9, 1975, that there is no issue of fact as to the amount of damages and that the amount is liquidated at \$161,895.75. There is therefore no issue as to the amount of damages to try.

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Murray Gartner

Sworn to before me this  
12th day of May, 1975.

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Notary Public



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----

LEVET, D. J.

69 Civil 1900

MEMORANDUM and ORDER  
ON POST-TRIAL MOTIONS.

I have examined the respective contentions of both plaintiff and defendant in respect to the recent verdict in the above-entitled case and I have attempted to arrive at a conclusion which would avoid the necessity of a retrial. However, it is a difficult situation.

Plaintiff contends in effect that the verdict as to damages was inadequate and clearly against the weight of the evidence and that the court should therefore enter judgment for plaintiff notwithstanding the verdict for the allegedly undisputed liquidated damages of \$161,895.75 with interest from May 20, 1968.

On the other hand, defendant contends:

(a) That the jury's verdict regarding the claim of negligence was clearly against the weight of the evidence and that the court should

therefore enter judgment for defendant notwithstanding the verdict;

(b) That the jury's award of \$70,000 for compensatory damages was also clearly against the weight of the evidence and that the court should therefore set it aside and order a new trial of all the issues;

(c) That the entire verdict with regard to liability and damages is a transparent compromise between liability and damages, requiring a new trial of all issues;

(d) That the liability verdict is inconsistent on its face and the court should therefore set it aside and order a new trial of all the issues.

The following procedural matters should be noted:

(1) The special verdict was approved by both counsel without objection;

(2) Moreover, in my charge I explained and charged as to damages that:

(a) Plaintiff must prove by a fair preponderance of the credible evidence the amount of its damages resulting from any breach of contract or negligence;



(b) If defendant is liable to plaintiff then defendant must respond to all damages that are the natural and probable consequences of its breach of contract or negligence;

(c) Compensatory damages are given in satisfaction or recompense of the actual loss sustained by plaintiff;

(d) The total sum claimed by plaintiff for compensatory damages was \$161,895.75.

The fact is that the jury, as indicated by the special verdict concluded that there was no breach of contract. It may be that on a second trial defendant may argue that the jury should be instructed that if this is so, plaintiff cannot recover. However, to apply that here, it is complicated by the second alleged claim of plaintiff, sustained by the jury, that is, the finding of negligence in making its appraisal. It could be asserted that a negligent appraisal is not a compliance with a contract. The fact is that perhaps plaintiff had "too many strings to its bow" and might possibly be advised to drop the negligence claim on a retrial. In any event, by reason of the instructions on the special verdict, the jury attempted to measure the damages resulting from the negligence. The \$70,000 allowed is in all probability inadequate in the event that the proximate cause of the payment of the guarantee by plaintiff was defendant's negligence.

I. JURY'S AWARD OF \$70,000 COMPENSATORY  
DAMAGES IS INADEQUATE

It is certainly not clear as to how the jury arrived at the amount of \$70,000 for compensatory damages but this award is definitely inadequate on the facts and clearly not supported by any evidence presented to the jury in the course of this trial.

At the trial plaintiff introduced into evidence an Advice of Charge memo (Pl. Ex. 22), indicating that on May 20, 1968 the First Western Bank and Trust Company debited plaintiff's account in the sum of \$163,270.70 in satisfaction of the unpaid balance and interest due on Time & Micro's note guaranteed by plaintiff. At a later date, a sum of \$1,374.95 was refunded to plaintiff for overpayment of the amount due, which left a total of \$161,895.75 paid by plaintiff in discharging its guarantee of Time & Micro's note.

This amount, paid by plaintiff, was uncontroverted by defendant at trial and is not questioned at this time. Indeed, defendant has essentially stipulated this sum as representing the amount of damages, if any, sustained by plaintiff. (See Defendant's Memorandum of Law in support of its motion, filed on May 9, 1975, p. 18.) Further, in the affidavit of Arnold Stream, defendant's attorney, he states at page 8 that "[t]he liquidated damages in this case were \$161,895.75."



Obviously, the jury's award of \$70,000 is substantially below the essentially undisputed liquidated damages of \$161,895.75 in this case and is therefore clearly inadequate. There was absolutely no evidence introduced at trial to support the jury's said finding.

## II. VERDICT WAS A COMPROMISE

In *Freight Terminals, Inc. v. Ryder System, Inc.*, 461 F. 2d 1046 (5th Cir. 1972) the Court of Appeals stated:

"A compromise verdict is one where it is obvious that the jury compromised the issue of liability by awarding inadequate damages. In a \*\*\* suit, where the damages are virtually liquidated but the jury, nevertheless, awards a much smaller amount, the court may find inadequate damages." (Citations omitted.)

Id. at 1053.

In a case such as this, where the issue of liability is strenuously contested and an obviously unjust and inadequate verdict as to damages is rendered by the jury, such a verdict gives rise to the inherent inference that it is the product of a compromise. This type of verdict does

"not represent a fair estimate of the plaintiff's loss, but merely a difference of opinion among the jurors as to defendant's liability and a compromise of the controversy at the expense of both litigants. Such a finding ought not to stand. It ought to be set aside not only as to damages, but as to liability [as well]...."

Schuerholz v. Roach, 58 F. 2d 32, 34 (4th Cir. 1932). A compromise verdict is essentially a process by which jurors favoring no liability will yield to those favoring high damages by agreeing to liability with a reduced award for damages. DeLuca v. Wells, 58 Misc. 2d 878, 879 (1968). In National Fire Insurance Co. of Hartford v. Great Lakes Warehouse Corp., 261 F. 2d 35 (7th Cir. 1958) the jury found that plaintiff was entitled to recover, yet it awarded only one-half of the amount of its loss as established by the undisputed evidence. In that case the court stated:

"It is absurd to say this is anything other than a compromise verdict and highly improper as a compromise, not only as to damages, but on the issue of liability."

Id. at 38.

### III. NEW TRIAL AS TO ALL ISSUES

Under Rule 59 of the Federal Rules of Civil Procedure the court should grant a new trial as to all issues when it appears that the jury's verdict is the result of a compromise. 6A Moore's Federal Practice (2d ed.), ¶ 59.08[4], p. 59-127. After carefully considering these questions I have concluded that the only appropriate procedure in this case is to set aside the verdicts both as to liability and as to damages, and order a new trial as to all issues. The new trial must be granted



as to all issues since the verdicts as to both liability and damages are interwoven and tainted by the improper determination of the jury. The verdicts are not separable and distinct from one another. As previously stated, a compromise verdict does injustice to both parties and cannot be allowed to stand.

Therefore, the court grants defendant's motion insofar as I hereby direct that the jury's verdict rendered on May 1, 1975 be set aside, and order a new trial of all the issues. The new trial will commence on June 12, 1975 at 10:00 A.M. The other outstanding motions made by the respective parties are hereby granted to the extent that they are consistent herewith and otherwise denied. I reach this conclusion in spite of the fact that I attempted to avoid a retrial of this action, if appropriate. However, in view of the circumstances surrounding this verdict, justice compels a new trial as to all issues.

So ordered.

Dated: New York, N.Y.  
May 28, 1975.

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(SGD) RICHARD H. LEVET  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

:  
:  
: 69 Civ. 1900 (RHL)

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:  
: NOTICE OF MOTION  
: TO AMEND ORDER

S I R S:

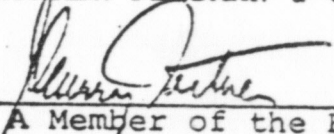
PLEASE TAKE NOTICE that, upon the annexed affidavit of MURRAY GARTNER, sworn to the 5th day of June, 1975, and upon the prior pleadings and proceedings heretofore had herein, the undersigned, on behalf of plaintiff, Ajax Hardware Manufacturing Corporation ("Ajax"), will move this Court before the Hon. Richard H. Levet, on June 9, 1975, at 9:30 A.M. at Room 2103, United States Courthouse, Foley Square, New York, or as soon thereafter as counsel can be heard for: (1) an order, pursuant to 28 U.S.C. §1292(b), amending the Memorandum and Order of this Court, dated May 28, 1975, setting aside the jury verdict in favor of plaintiff which was returned on May 1, 1975, and ordering a new trial of all issues of this action, by incorporating therein the statement required by 28 U.S.C. §1292(b), in order to permit



plaintiff to apply to the Court of Appeals for permission to take an appeal from the said order; and (2) granting such other and further relief as the Court may deem appropriate.

Dated: New York, New York  
June 5, 1975

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By   
A Member of the Firm

777 Third Avenue  
New York, New York 10017  
(212) 688-3200

Attorneys for Plaintiff

AJAX HARDWARE MANUFACTURING CORPORATION

TO: Monasch Chazen & Stream  
733 Third Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

69 Civ 1900 (RHL)

-against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

AFFIDAVIT  
IN SUPPORT OF  
MOTION TO AMEND ORDER

-----X  
STATE OF NEW YORK )  
                              ) SS.  
COUNTY OF NEW YORK )

MURRAY GARTNER, being duly sworn, deposes and says:

1. Based on the record of the trial herein in which I represented plaintiff, Ajax Hardware Manufacturing Corporation ("Ajax"), and on the Court's Memorandum and Order of May 28, 1975, I make this affidavit in support of plaintiff's motion for an order amending the Court's Order to include in said order the statement required pursuant to 28 U.S.C. §1292(b), so that plaintiff may apply to the Court of Appeals for permission to take an interlocutory appeal from that order.

The Court's Order Involves a Controlling  
Question of Law As To Which There Is Sub-  
stantial Ground For Difference of Opinion.

2. In setting aside both the jury's special verdict that defendant was negligent and that such negligence was the



proximate cause of damage to plaintiff, and its special verdict of damages in the amount of \$70,000, the Court treated the two separate findings as though they were but one verdict. The Court relied on the "inherent inference" from the concededly inadequate award of damages of \$70,000 that the jury had compromised the question of liability as well as damages. None of the cases cited by the Court in its Memorandum Decision, however, supports the proposition that any such inference flows from such separate findings.

3. Indeed, in two of the four cases cited in the Court's Memorandum, no compromise on liability was found. Freight Terminals, Inc. v. Ryder System, Inc., 461 F.2d 1046 (5th Cir. 1972); De Luca v. Wells, 58 Misc. 2d 878, 879 (1968). In the De Luca case, moreover, the Court ordered a new trial on damages alone, just as plaintiff urged the Court to do in this case. In neither of the two other cases cited in the Memorandum\* was an inference of compromise on liability drawn from the mere inadequacy of damages; on the contrary, it was the facts appearing on the face of the records therein which led to the inference .

4. By contrast, the facts appearing on the face of the record herein\*\* including the Court's explicit instructions to the

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\*Schuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932) and National Fire Ins. Co. of Hartford v. Great Lakes Warehouse Corp., 261 F.2d 35 (7th Cir. 1958), both cited and distinguished in plaintiff's Reply Memorandum dated May 22, 1975, which is incorporated herein by this reference.

\*\*Those facts are set forth in the affidavit of Murray Gartner, sworn to on May 12, 1975, and incorporated herein by this reference.

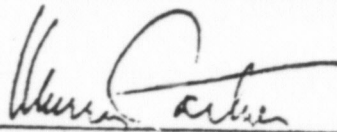
jury to determine the question of liability first and what was said to the jury about how to determine damages, lead, as a matter of law to the inescapable inference that if there was any compromise by this jury, it was only on the amount of damages and not on the question of liability. The many cases cited by the plaintiff in its Reply Memorandum dated May 22, 1975 (pp. 24-36) hold that an inference of a compromise verdict as to liability cannot be drawn simply from an award of inadequate damages. Those cases demonstrate beyond argument that, in the words of 28 U.S.C. §1292(b), there is, at the minimum, "substantial ground for difference of opinion" on the "controlling question of law" of whether a compromise on the issue of liability may be inferred merely from finding of inadequate damages, in the face of a separate and prior finding of liability and adequate explanation on the face of the record for the jury's inadequate award of damages.

Immediate Appeal From The Order May Materially  
Advance The Ultimate Termination of the Litigation

5. It is obvious that if an interlocutory appeal is allowed, and the Court of Appeals sustains that appeal, the termination of this litigation will be materially advanced; the parties will be spared the extraordinary expense of a second trial; and the Court will be spared the expenditure of considerable judicial time.

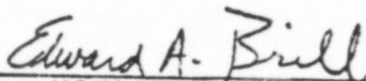


6. Therefore, reserving all other objections which plaintiff may have to the Court's Memorandum and Order of May 28, 1975, plaintiff respectfully requests that the Court amend its order to allow application to the Court of Appeals for permission to take an appeal which may make a re-trial unnecessary.



MURRAY GARTNER

Sworn to and subscribed  
before me this 5th day  
of June, 1975.

  
NOTARY PUBLIC

EDWARD A. BRILL  
Notary Public, State of New York  
No. 4503338  
Qualified in New York County  
Commission Expires March 30, 1977.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

against

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

69 Civ. 1900 (RHL)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK )

COUNTY OF NEW YORK )

SOUTHERN DISTRICT OF NEW YORK )

ss.:

ARNOLD C. STREAM, being duly sworn, deposes and says:

:  
Preliminary Comments

1. I am a member of the firm representing the defendant. I was trial counsel when this action was tried before this Court and a jury last April. This affidavit opposes the plaintiff's motion seeking an order amending the memorandum and order of this Court dated May 28, 1975, which set aside the jury verdict and directed a new trial of the action to permit the filing of an appeal from that order pursuant to Title 28, Section 1292(b) of the United States Code.

2. The grounds for our opposition may be summarized as follows:



(a) The motion is a transparent attempt to delay the retrial of this action which is scheduled to begin on June 12th.

(b) It is a step being taken with no expectation that it will succeed but rather as a necessary prerequisite to the institution of a second mandamus proceeding under the All Writs Statute (28 U.S.C. §1651). In ~~that~~ conrection, we suppose that just as counsel tried, although unsuccessfully, the last time, they will again attempt to prorogue the trial by securing an appellate stay.

(c) This is not a case which in any way warrants, or for that matter has ever warranted, a certification pursuant to Section 1292(b) for the reason that the order of this Court granting a new trial was (i) clearly within its sound judicial discretion; (ii) derived from this Court's consideration of the entire record in the case; (iii) involved evaluations of the trial proceedings which satisfied this Court that it was in the interests of justice to set aside the verdict and grant a new trial on all issues; and (iv) based upon the conclusion by this Court that a new trial was required for all the reasons asserted in our post-trial motions under Rule 50(b) and Rule 59 of the Federal Rules of Civil Procedure.

(d) The application is improper for the additional fundamental reasons that the order as to which the plaintiff seeks a certification (i) does not involve a controlling question of law; (ii) does not involve a substantial ground for difference of opinion on the incidental questions of law involved; (iii) does not involve

any proposition of law or fact as to which the plaintiff demonstrates a likelihood of success upon appellate review; and (iv) does not involve the kind of complex, protracted or potentially costly litigation which was the object of the Interlocutory Appeals Act of 1958 [28 U.S.C. §1292(b)].

#### Background of Case

3. There is nothing extraordinary about this lawsuit. It is a simple commercial case involving the appraisal by the defendant of a plant facility owned or operated by the plaintiff. Apart from the legal gyrations of plaintiff's counsel involving a series of pretrial motions, including an unsuccessful application for a writ of mandamus to delay the trial, the proof was simple and direct. The plaintiff called only two witnesses, both experts, and otherwise relied entirely upon pretrial examinations before trial. The defendant called only one witness. The case lasted a few days. It would have been shorter save for extended remarks by counsel for the plaintiff in the presence of the jury which were calculated to enlist improperly the sympathy of the jury and to divert it from its real function. These dilations were all the more unseemly when we remind the Court that this short trial, which took place only because this Court issued a peremptory direction for it to proceed without further delays, occurred 6 years after the action was instituted and 9 years after the occurrence of the transactions involved.



4. It is evident to us that the plaintiff now seeks not to shorten but to enlarge the timespread of this case since success on this motion would in all likelihood require an appellate consideration of the entire trial record which would be followed either by an affirmance and a remand for the new trial or a reversal, and then a second appeal, this time by the defendant, which would call for a second review of the entire record. There is simply no warrant for involving a busy appellate tribunal with this kind of duplicating effort in a case like this and we see no way that this Court can allow the plaintiff to engage in such redundant practices by certifying for appellate review at this time its order directing a new trial.

5. The case was submitted to the jury at the conclusion of the trial during the afternoon of April 30, 1975. The jury failed to reach a verdict that afternoon. The members resumed deliberations at 10:00 A.M. on May 1st. By the luncheon recess the jury had reached no verdict. The panel returned after lunch and resumed its deliberations. Late that afternoon they reported to the Court that they were in hopeless disagreement and sought to be discharged. The Court will recall that the jury members came into the courtroom with their hats and coats, satisfied that they could do nothing further to resolve their differences. Before that time they had on two separate occasions requested additional instructions on the substantive aspects of liability involving the first count (breach of contract) and the second count (negligence). They were returned to the jury room for further delibera-

tions. It was less than 10 minutes later that the jury reported that it had arrived at a verdict. That verdict was analyzed in detail in our post-trial motion papers, copies of which are attached hereto and incorporated herein by reference.

6. The memorandum and order of this Court, a copy of which is also attached hereto, was handed down on May 28, 1975.

7. The instant motion of the plaintiff was not made until after this Court scheduled a pretrial conference for Monday morning, June 9th, with respect to the retrial scheduled for June 12th. The motion papers were not received by us until late last Thursday.

This Motion

8. The instant motion mounted by the plaintiff flies directly into the face of these facts. It seeks in effect to have this Court narrow and limit the bases for its order so as to fit within the special requirements of Section 1292 and thereby to undermine the unexceptionable reasoning set forth by this Court for having directed a new trial as a matter of sound judicial discretion. We do not believe it proper for this Court to be required to tailor its relief to fit on the plaintiff's Procrustean bed.

9. We duly note that although this Court stated in its memorandum that it attempted to reach a conclusion which would have avoided the necessity of a retrial, it nevertheless was satisfied not merely as a matter of law but upon the record of the entire trial



proceedings that the interests of justice compelled a new trial as to all issues.

10. Plaintiff's counsel suggest in their papers that in concluding that the verdict was a transparent compromise, it did so in vacuo as a matter of law. The point is of course absurd. We believe that we correctly read this Court's memorandum as reflecting the fact that it reached that conclusion only in the context of the entire record, including the factors concerning the jury's deliberations recited earlier in these papers, and only after giving pointed effect to the circumstance that the issue of liability was "strenuously contested", a fact finding which could only be predicated upon the conclusions reached by this Court from the course of the very trial itself. It was precisely in the context of such factors that we argued at length in our post-trial motion and in our supporting briefs that a general retrial of the issues of liability and damages was indicated to be a proper exercise of sound judicial discretion.

11. Of even greater importance is the fact that plaintiff's counsel either overlooks or disregards the fact that at the close of the trial and following the verdict of the jury we did not merely make a motion to set the verdict aside on the ground that it was a transparent compromise, but we also made the following motions:

(a) A motion for the same relief upon the ground that the verdict was against the weight of evidence;

(b) A motion to set the verdict aside on the

ground that the verdicts on Counts I and II were incompatible and constituted an abuse of power; and

(c) A motion that this Court set aside the verdict on Count II on the ground that it might have been the result of undue empathy and passion of the jury, and that a decent regard for the fair administration of justice and for the trial process in the federal establishment, in view of the statements and allusions of plaintiff's trial counsel to trial unfairness, warranted a new trial on this ground alone.

12. The memorandum of this Court set the verdict aside and directed a new trial not only upon the basis of our motion made for that relief because of the compromise verdict but also upon the basis of all of these other motions which were consistent with that same determination, and which were granted in the last paragraph of the memorandum. The plaintiff's position, that a narrow, controlling question of law involving a substantial ground for a difference of opinion accompanied by a reasonable likelihood of success by the plaintiff at the appellate level which would be dispositive of the litigation in whole or substantial part, is completely untenable. This is a garden-type lawsuit, neither complex nor lengthy. The direction for a new trial granted by a trial judge upon the basis of his reflections on and his opinion of the circumstances underlying a compromise verdict and other shortcomings in the jury's verdict is neither unusual nor extraordinary.

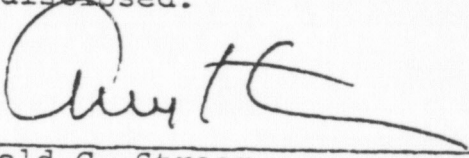


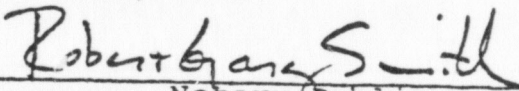
It is the kind of sound judicial discretion which is meant to be reposed in a trial judge. We respectfully urge that this Court decline to convert that judicial action into something so extraordinary as to warrant certification and to produce an interlocutory appeal which is bound in the long run to engender greater delay and greater expense than might result from a prompt retrial in conformity with this Court's current directions. We do not object to that retrial. We are prepared to commence that engagement on schedule.

13. Nothing contained in these papers is to be construed as a waiver or abandonment of any motions or grounds for appellate review which may be available to the defendant with respect to the first trial if for any reason an appellate review is ordered on an interlocutory basis or is otherwise based upon the record of the proceedings with respect to the first trial.

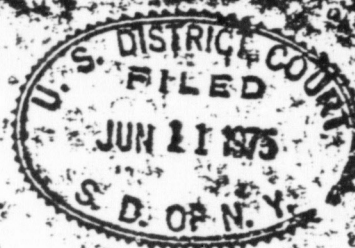
WHEREFORE, it is our respectful prayer that the plaintiff's motion be denied in all respects or that a clarifying memorandum be issued to reflect the fact that the decision reached by this learned Court was not on the narrow question of law but in fact involved a searching and consideration of all trial proceedings including the jury's activities to the extent disclosed.

Sworn to and subscribed  
before me, this 7th day  
of June, 1975.

  
Arnold C. Stream

  
Notary Public  
ROBERT GARY SMITH  
Notary Public, State of New York  
No. 24-4518697  
Qualified in Kings County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

62 Civil 1900

MEMORANDUM  
and  
ORDER

LEVET, D.J.

Plaintiff's motion pursuant to 28 USC § 1292(b) to amend the Memorandum and Order of this Court dated May 28, 1975 in order to permit plaintiff an interlocutory appeal to this Court's decision to set aside the jury verdict and order a new trial as to all issues is denied. A copy of the said Memorandum and Order is hereto attached.

28 USC § 1292(b) provides in pertinent part:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in such order." (Emphasis added.)

I am not "of the opinion" that my order directing a new trial as to all issues in this case involves a "controlling question of law" as to which there is "substantial ground for difference of opinion." Neither I



"of the opinion" that an appeal from my order will "materially advance the ultimate termination of the litigation."

The adjudication of a motion for a new trial is addressed to the sound judicial discretion of the trial court. 6A Moore's Federal Practice (2d ed.), ¶ 59.05[5], page 59-73. The trial court having knowledge and responsibility for the trial is in the best position to decide the motion on its merits and apply this principle so that substantial justice is done on the facts of the individual case. Legal Aid Society of New York v. Herlands, 399 F. 2d 343 (2d Cir. 1969). For this reason the trial court's action on a motion for a new trial is not normally reviewable. United States v. Mountain State Fabricating Co., 282 F. 2d 263, 265 (4th Cir. 1960), 6A Moore's Federal Practice (2d ed.), ¶ 59.05[5], page 59-78.

Despite the fact that the special verdict was divided into two sections, entitled "Liability" and "Damages" respectively, I determined that the jury's verdict is not separable and distinct as plaintiff asserts but, rather, that its findings are interwoven and tainted as a compromise verdict. Since a compromise verdict cannot be allowed to stand, I determined that substantial justice necessitated the retrial of all issues and ordered the jury's verdict set aside, directing that both parties prepare for a new trial as to all issues to commence on June 12, 1975 at 10:00 A

( The case of *Compagnie Nationale Air France v. Port of New York Authority, et al.*, 427 F. 2d 951 (2d Cir. 1970) is nearly identical to the present case. In that case the district court judge found that the jury, after extended deliberation, had compromised its verdict, having awarded plaintiff only \$20,000 when the stipulated damages amounted to \$113,483.58. Accordingly, the judge ordered a new trial as to all issues and subsequently refused to certify plaintiff's request under 28 USC § 1292(b) for an interlocutory appeal. On appeal, the Second Circuit Court of Appeals stated that

"it has long been the rule in this circuit (and others), that an order granting a new trial is not ordinarily a 'final' judgment from which an appeal may be taken .... The result can be no different because a party has been denied judgment notwithstanding the verdict or a retrial limited to damages and the judge considers a complete new trial more appropriate." (Citations omitted. 427 F. 2d at 954.

I believe that a completely new trial as to all issues is absolutely necessary and see no value in certifying the Memorandum and Order of this Court dated May 23, 1975 for an interlocutory appeal. Therefore, I hereby deny plaintiff's request.

So ordered.

Dated: New York, N.Y.  
June 11, 1975.

(SGD) RICHARD H. LEVET  
United States District Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

69 Civ. 1900 (RHL)

- against - :

MOTION UNDER  
28 U.S.C. §455

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :  
-----x

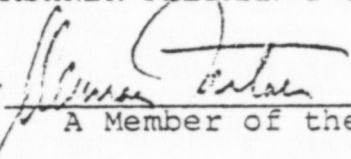
S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of MURRAY GARTNER, sworn to the 10th day of June, 1975, and upon all prior pleadings and proceedings heretofore had herein, the undersigned, on behalf of plaintiff, Ajax Hardware Manufacturing Corporation ("Ajax"), will move this Court before the Hon. Richard H. Levet on June 23, 1975 at 9:30 A.M. at Room 2103, United States Courthouse, Foley Square, New York, or as soon thereafter as counsel can be heard for an order pursuant to 28 U.S.C. §455, disqualifying the Hon. Richard H. Levet from further participation in any proceedings in this action, on the ground that the

said Judge has so conducted himself herein that his impartiality may reasonably be questioned.

Date: New York, New York  
June 10, 1975

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By   
A Member of the Firm

777 Third Avenue  
New York, New York 10017  
(212) 688-3200  
Attorneys for Plaintiff

AJAX HARDWARE MANUFACTURING  
CORPORATION

TO: Monasch Chazen & Stream  
733 Third Avenue  
New York, New York 10017

Endorsed:

Motion Denied.

So Ordered.

Dated: New York, N.Y.  
June 23, 1975

RICHARD H. LEVET  
United States District Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

- against -

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----x

:

:

:

:

:

:

69 Civ. 1900 (RHL)

AFFIDAVIT

MURRAY GARTNER, being duly sworn, deposes and says:

1. On the trial record herein, and on all the prior and subsequent proceedings had and papers filed herein, I believe that the proper representation of plaintiff herein forces me to make this affidavit in support of plaintiff's motion under 28 U.S.C. §455\*, that the Honorable Richard H. Levet, District Judge, disqualify himself from any further participation in this action.

\* Title 28, Section 455, as amended December 5, 1974, provides in pertinent part:

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Public Law 93-512, 88 Stat. 1609.

The amended Statute sets up "an objective standard" requiring judicial disqualification where "there is a reasonable factual basis for doubting the judge's impartiality" and "has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute." 1974 U.S. Code Cong. & Admin. News, Legislative History, 93rd Congress 6354-55.

2. The basic ground of the motion is that the conduct of said Judge Levet in the course of the proceedings and during the trial of this action has been such as to lead to the reasonable conclusion that he is not impartial to the plaintiff in this action, but on the contrary, has denied the plaintiff a fair trial by his hostile attitude toward the plaintiff's case and attorney, and by the obstacles he has unjustifiably put in the way of a fair presentation of plaintiff's case in a judicial atmosphere.

3. Specifically, the record herein establishes the following partiality and unjudicial behavior by the said Judge Levet:

A. From the beginning of his involvement in this case, and continuously thereafter, he has denigrated plaintiff's case and has communicated his unmistakable objective of disposing of it, regardless of whether the claims were fairly tried. Haste and termination seemed to be his watchwords, rather than fairness and deliberation.

B. Continuously, by his tone of voice, when addressing plaintiff's counsel, both in and out of the presence of the jury, and when referring to elements of plaintiff's case, he has shown great hostility to plaintiff's case.

C. Continuously, both in and out of the presence of the jury, he has interrupted plaintiff's attorney's



statements, questions and arguments in such manner as to prevent their proper delivery or consideration; and he has shown great reluctance to permit plaintiff's counsel to speak, while indulging defendant's counsel by listening patiently and courteously to all he wished to say.

D. His failure to deliberate and his haste to decide questions against plaintiff have required an inordinate amount of effort and expense on the part of plaintiff to attempt to undo the prejudicial effects of those rulings. For example, his insistence on beginning the trial of this action on March 6, 1975, although he knew in advance that defendant very likely would not be ready, forced plaintiff to incur the expense of complete preparation including very substantial transportation costs of its witnesses, only to be required to repeat a large part of that preparation expense when defendant was not ready on March 6. His adamant refusal to give plaintiff adequate time for summation to the jury, his haste in ruling on requests to charge, and his failure to provide time for deliberation and consideration on his actual charges, outside the presence of the jury, among other causes, led to an inadequate award of damages. This award precipitated motions by both parties, and weeks of work, resulting in four memoranda of law. With no oral argument, three working days after submission of plaintiff's voluminous Reply Brief, and without a single

reference to any of the cases cited in that brief or to the controlling facts called to the Court's attention, the Court made the award of inadequate damages the basis for setting aside both the jury's verdict of defendant's liability and its verdict for damages. All the time, effort, and great expense of the trial would thus be wasted. And, again exalting expedition over fairness, a new trial was set for June 12, 1975, without any inquiry about the availability of counsel or witnesses. Such procedures are inherently unfair to the plaintiff, which has the burden of proof. They impose unbearable costs on plaintiff in its efforts to establish its claims in the face of the evident intent of the Court to go through the form of a trial as hastily as possible, without concern that such trial be held at a time and under circumstances which will give plaintiff a fair opportunity to present its case; plaintiff is thus denied due process of law. When at the pre-trial conference on June 9, 1975, scheduled by the Court, I informed the Court that none of plaintiff's witnesses was available on June 12, 1975, and that my commitments make me unavailable, he agreed to adjourn the case to October 6, 1975, only on condition that plaintiff waive interest from June , 1975, to October 6, 1975, which I was forced to do under protest.

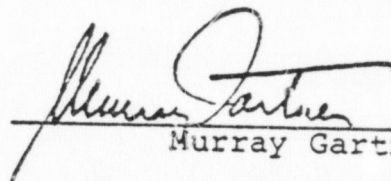
E. He has not discharged--indeed it appears that he does not recognize--his obligation of monitoring and



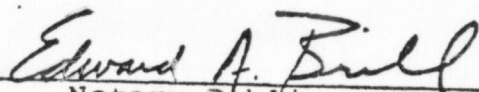
directing the proceedings at a trial so that it takes place in a judicial atmosphere, without evident partiality of the Court against plaintiff and for defendant. Nor has he discharged his obligation to clarify issues for the jury, but on the contrary, has left them to decide many questions without adequate guidance and with confusing statements. To have the same Judge preside at a second trial presages the same enormous waste, since undoubtedly any such second trial will be conducted in the same atmosphere of hostility to plaintiff and with the same refusal on the part of the Judge to properly instruct and guide the jury, as when the Judge on the specific request of the jury for instructions on breach of contract refused to instruct them to what extent negligent performance of the contract, in this case, would constitute breach of contract.

4. Defendant's attorney himself founded his motion for a new trial, in part, on plaintiff's complaints throughout the trial of partiality of the Court. It appears that the Court's order of May 28, 1975, in part, relies on that ground to support its order directing a new trial, since, without discussion, it grants all defendant's motions insofar as they are not inconsistent with its decision to grant a new trial. Since reference to questions about Judge Levet's partiality against plaintiff have been made by both plaintiff's and defendant's attorneys, the same Judge should not preside at a second trial, which indeed was ordered by that Judge, ostensibly to correct alleged error which appears to have resulted from the very partiality which plaintiff seeks to avoid.

5. The partiality against plaintiff exhibited by this Judge in this case is not unique to this case. All of the behavior described above, with the exception of the jury treatment described, occurred even more egregiously in the almost incredible and incredibly lengthy and costly proceedings in Republic Corporation v. Procedyne Corporation, 70 Civ. 3726, in which I represent plaintiff in a case tried in October, 1974, before Judge Levet sitting without a jury. On information and belief, plaintiffs in other cases, for example, Porss v. Maritime Overseas, have been subject to similar treatment. Indeed, such partiality is a pattern known to the bar of this Court, the result of which is to make the pursuit of private plaintiffs' claims so costly that many such claims are settled for unreasonably low amounts.

  
Murray Gartner

Sworn to and subscribed  
before me this 10th day  
of June, 1975.

  
Notary Public

EDWARD A. BRILLE  
Notary Public, State of New York  
No. 4503338  
Qualified in New York County  
Commission Expires March 30, 1977



UNITED STATES DISTRICT COURT  
UNITED STATES COURTHOUSE  
NEW YORK, N. Y. 10007

CHAMBERS OF  
JUDGE RICHARD H. LEVET

July 10, 1975.

Murray Gartner, Esq.  
Poletti Freidin Prashker Feldman & Gartner, Esqs.  
777 Third Avenue, New York, N.Y. 10017

Arnold C. Stream, Esq.  
Monasch Chazen & Stream, Esqs.  
733 Third Avenue, New York, N.Y. 10017

Gentlemen:      Re: Ajax Hardware v Industrial Plants, 69 Civ 1900

Enclosed you will find a copy of the Special Verdict which I propose to use at the retrial of this action on October 6, 1975. Its basic purpose is to assist the jury in arriving at a consistent verdict based on the proof. If you conclude that some other wording is preferable, please prepare the complete Special Verdict which you recommend and send a copy to your adversary and to the court.

To Mr. Gartner: If you should wish to withdraw the fraud claim, naturally, the question and answer as to fraud, etc. may be omitted. On the other hand, if you wish to press that claim, will you please formulate a proposed special verdict question in regard to fraud, etc.

To Mr. Stream: If the fraud claim in question remains, please check the proposed question formulated by Mr. Gartner and submit any variance therefrom which you would recommend.

Your papers with respect to the Special Verdict as above requested are to be exchanged and filed with the undersigned on or before September 2, 1975.

Very truly yours,

*Richard H. Levett*

United States District Judge

enc.

AJAX HARDWARE v INDUSTRIAL PLANTS  
69 Civil 1900

SPECIAL VERDICT

1. Has plaintiff proved by a fair preponderance of the credible evidence that on or about August 12, 1966 defendant agreed to appraise the dollar amount which in its opinion could be realized from the sale of individual items of machinery and equipment at the Time & Micro plant under the conditions at a forced sale or liquidation sale?

\_\_\_\_\_  
Yes      No

If your answer to question No. 1 is "Yes," proceed to question No. 2.

If your answer to question No. 1 is "No," sign the last sheet attached hereto.

2. Has plaintiff proved by a fair preponderance of the credible evidence that defendant breached said contract (referred to in question No. 1) in that:

- (a) Defendant failed to provide plaintiff with the type of appraisal mentioned in question No. 1 above?

\_\_\_\_\_  
Yes      No

AND/OR

- (b) Defendant was negligent in performing said contract of appraisal in accordance with the duty of care reasonably expected of professionals in the field of appraisal?

\_\_\_\_\_  
Yes      No



If your answer to either part (a) or (b) of question No. 2 is "Yes," proceed to question No. 3.

If your answers to both parts (a) and (b) of question No. 2 are "No," omit question No. 3 and proceed to question No. 4.

3. Has plaintiff proved by a fair preponderance of the credible evidence that said breach of contract (either as stated in question 2(a) or 2(b) or both) was a proximate cause of inducing plaintiff's execution of an agreement to guarantee a bank loan to Time & Micro (Ex.     )?

Yes     No

If your answer to question No. 3 is "Yes," proceed to question No. 4.

4. What is the amount to which plaintiff is entitled for damages by reason of executing the said guarantee agreement and honoring the said guarantee agreement? \_\_\_\_\_<sup>97</sup>/<sub>100</sub>

FORM OF SPECIAL VERDICT PROPOSED BY DEFENDANT,  
DATED JULY 23, 1975.

AJAX HARDWARE v. INDUSTRIAL PLANTS  
69 Civil 1900

SPECIAL VERDICT

1. Has the plaintiff (Ajax) proved by a fair preponderance of the credible evidence that it entered into a contract with the defendant (Industrial Plants) whereby the defendant promised and agreed to provide plaintiff with an appraisal establishing the amount which could be realized from the sale of individual items of the machinery and equipment of Time & Micro at a forced sale in liquidation at a public auction?

Yes

No

If your answer to Question No. 1 is "No," do not read or answer further questions; simply sign the last sheet attached hereto.

If your answer to Question No. 1 is "Yes," then proceed to Question No. 2.

2. Has plaintiff (Ajax) proved by a fair preponderance of the credible evidence --

(a) That defendant (Industrial Plants) did not provide plaintiff (Ajax) with the kind of appraisal referred to in Question No. 1



and thereby breached its agreement with plaintiff?

Yes

No

- or -

(b) That defendant (Industrial Plants) provided plaintiff (Ajax) with the kind of appraisal referred to in Question No. 1, but failed to observe the standard of care reasonably expected in the circumstances present, and thereby breached its agreement with plaintiff?

Yes

No

If your answers to both parts (a) and (b) of Question No. 2 are "No," do not read or answer further questions; simply sign the last sheet attached hereto.

If your answer to either part (a) and (b) of Question No. 2 is "Yes," then proceed to Question No. 3.

3. Has plaintiff (Ajax) proved by a fair preponderance of the credible evidence that the breach of contract by defendant (Industrial Plants) was the proximate cause of plaintiff's execution of an agreement with Time & Micro guarantying a bank loan to Time & Micro?

Yes

No

If your answer to Question No. 3 is  
"No," do not read or answer the next  
question; simply sign the last sheet attached  
hereto.

If your answer to Question No. 3 is  
"Yes," then proceed to Question No. 4.

4. What is the amount to which plaintiff  
is entitled as damages?

\$ \_\_\_\_\_

\* \* \*

(Signature) \_\_\_\_\_  
Juror



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

- against -

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

:  
:  
69 Civ. 1900 (RHL)

:  
:  
:  
:  
PLAINTIFF'S PROPOSED  
SPECIAL VERDICT AND  
OBJECTIONS TO SPECIAL  
VERDICT

PLAINTIFF'S PROPOSED

SPECIAL VERDICT

1. Has the plaintiff (Ajax) proved by a preponderance of the evidence that the defendant (Industrial Plants) was negligent in making its appraisal of the Time and Micro machinery and equipment by failing to observe the standard of care reasonably expected of professional appraisers in similar circumstances, and that such negligence was the proximate cause of damage to plaintiff?

\_\_\_\_\_  
YES NO

2.

- (a) Has the plaintiff (Ajax) proved by a preponderance of the evidence that defendant (Industrial Plants) breached

the contract entered into on or about August 12,  
1966, and that plaintiff was damaged thereby?

— —  
YES NO

If Answer to Part (a) is "Yes", proceed to Part (b).

If Answer to Part (a) is "No", omit Part (b) and proceed  
to Question 3.

2.

(b) Defendant (Industrial Plant's) breached the contract  
between Ajax and Industrial Plants in that:

i) Defendant did not appraise the "forced sale  
value" of the Time and Micro machinery  
equipment, as it had agreed to do.

— —  
YES NO

ii) Defendant did not perform an independent  
professional appraisal of the Time and  
Micro machinery and equipment, as it had  
agreed to do.

— —  
YES NO

iii) Defendant did not perform its appraisal of the  
value of the Time and Micro machinery and  
equipment as collateral for a proposed loan  
in accordance with the standards customarily  
followed by professional appraisers.

— —  
YES NO



3. Has plaintiff (Ajax) proved by clear and convincing evidence that defendant committed actionable fraud by any misrepresentation or concealment of material information in connection with its services as plaintiff's appraiser, and that plaintiff suffered monetary loss or damage as a result of such fraud?

\_\_\_\_\_  
YES NO

If you have answered "Yes" to any one or more of Questions 1, 2, or 3, proceed to Question 4. If you have not answered "Yes" to any of these questions, omit question 4 and sign the last sheet attached hereto.

4. To what award is plaintiff entitled, if any, for punitive or exemplary damages? \$ \_\_\_\_\_

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

- against -

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

:  
: 69 Civ. 1900 (RHL)  
:  
: PLAINTIFF'S PROPOSED  
: SPECIAL VERDICT AND  
: OBJECTIONS TO SPECIAL  
: VERDICT

OBJECTIONS TO SPECIAL VERDICT

Plaintiff respectfully objects to the special verdict proposed by the Court on July 10, 1975. The questions formulated by the Court neither present to the jury all of the claims made by plaintiff in this action, nor do they fairly portray those claims which are included. The Court, moreover, apparently proposes once again to give the jury unlimited discretion as to the amount of compensatory damages in the case, ignoring the fact that the Court set aside a previous jury verdict in plaintiff's favor for less than the full amount claimed on the ground that the amount of damages in the case was undisputed and the verdict for a lesser amount inferentially represented a compromise by the jury. The defendant should not be allowed to withdraw its post-trial representation that damages in this case were liquidated and undisputed. No issue as to the amount of damages therefore



should be submitted to the jury.

Plaintiff submits to the Court herewith a revised form of special verdict, which will fairly and completely present to the jury the issues we intend to raise at trial.

Following is an explanation of the specific reasons for our disagreement with the special verdict proposed by the Court. Where appropriate, we shall also comment on the special verdict submitted by defendant on July 23, 1975. These objections are based upon the record of the first trial in this action with respect to plaintiff's separate claims and theories of liability. We reserve the right to submit additional objections, or new proposed questions, in conformance with the evidence adduced during the second trial at the appropriate time.

#### Objections to Proposed Special Verdict

Question 1. The Court, under this proposed question, would deny any verdict in plaintiff's favor, unless the jury finds that the "defendant agreed to appraise the dollar amount which in its opinion could be realized from the sale of individual items of machinery and equipment at the Time and Micro plant under the conditions at a forced sale or liquidation sale." Apart from the question's failure to fairly reflect the terms of the appraisal contract, it is manifestly improper to prevent jury consideration of the balance of plaintiff's case should

the jury answer this first question "No."

Due process of law requires that each of plaintiff's claims and alternate theories of recovery, if supported by the evidence at trial, must be fairly submitted to the jury.

National Bank of Commerce v. Royal Exchange Assurance of America, Inc., 455 F.2d 892 (6th Cir. 1972); see also, Kornicki v. Calmar Steamship Corp., 460 F.2d 1134, 1139 (3d Cir. 1972) ("[A] trial judge should not fashion interrogatories in such manner that he withdraws from the jury valid theories of recovery, if such theories are supported by the evidence.") Based on the evidence at the first trial, there are several alternate theories of recovery which do not depend upon a jury finding that defendant specifically agreed to appraise the "forced sale" value of the Time and Micro machinery (i.e. upon a "Yes" answer to Question 1), and plaintiff is entitled to submission of these theories to the jury, as well.

- a) Plaintiff is entitled to recover if defendant negligently performed an "in-place" appraisal.

Extensive evidence presented at the first trial supported plaintiff's contention that, even if the jury should find that plaintiff requested and defendant supplied only an "in-place" fair market value appraisal, plaintiff would still be entitled to recover for defendant's breach of contract or negligence.



Plaintiff proved by virtually uncontradicted evidence at the first trial that a proper appraisal according to professional standards would have shown that there was "no market" for the Time and Micro plant, "in-place" or otherwise, and that watchmaking machinery in the United States in 1966 had only minimal value under any conditions. If defendant had accurately appraised even the "in-place" value of the Time and Micro machinery, therefore, and conveyed that information to plaintiff, reasonable men could certainly find that plaintiff would not have nonetheless obligated itself to guarantee a loan in the amount of \$270,000, with the machinery as collateral.

Defendant not only negligently reported to plaintiff that the Time and Micro machinery had a "fair market value" of some \$919,000, and an additional "in-place" value of \$137,000, when in fact it had no market value, but defendant's appraisal report of August 19, 1966 was clearly calculated to impress Ajax with the desirability and high values of the assertedly scarce and much-sought-after machinery in the Time and Micro plant. Defendant made false and misleading assertions that the machinery was "not available to American manufacturers unless they are members of the trust, and even then the delivery of this type of machinery ranges between two and three years," that "manufacturers utilizing most high-precision equipment of this nature would pay important premiums over and above the values as

established in our appraisal if this equipment were made available to them", and that, "To our knowledge there is not one existing plant in this country so equipped." Clearly, these assertions were an important cause of plaintiff's obligating itself to guarantee the \$270,000 loan, with the Time and Micro machinery and equipment as collateral. The jury could certainly find that since plaintiff was not told, truthfully and professionally, that even the entire plant, as a plant, had "no market" and a minimal value, plaintiff, entered into the guarantee agreement because of defendant's breach of contract and false representations.

- b) Plaintiff is entitled to recover if defendant failed to select the appropriate type of appraisal value, or to adequately define the type of value supplied.

As plaintiff showed at the first trial, it was defendant's obligation as a professional appraiser to select the appropriate type of appraisal value for Ajax's purpose, and to define adequately in its appraisal report the value which it supplied. Thus, even if the jury does not find by its answer to Question 1 that defendant specifically agreed on August 12, 1966 to provide the "forced sale" value of the Time and Micro machinery, the jury can find on the evidence that defendant was told the purpose for which plaintiff requested and intended to use the appraisal. Conceivably, the jury might find that



there was no agreement on August 12, 1966 for defendant to supply a specific type of appraisal value (as Question 1 envisions), but that defendant simply agreed to perform an independent professional appraisal to meet plaintiff's stated purpose. If defendant supplied only an "in-place" fair market value appraisal of the Time and Micro machinery, despite the fact that plaintiff needed to know whether the machinery would provide adequate security as collateral for a loan, that failure to supply the correct type of appraisal value would constitute negligence and a breach of contract.

Defendant's additional failure to adequately define the type of valuation which it supplied, so that a misunderstanding or misapplication of the "fair market value" might occur, is a further instance of negligence causing damage to plaintiff regardless of the jury's findings as to terms of the August 12, 1966 agreement.

---

Question 1, as proposed by the Court to be an absolute prerequisite to recovery by plaintiff, ignores these alternate theories of recovery in negligence and breach of contract, which do not depend upon a finding as to the specific terms of the August 12, 1966 agreement.

Additionally, Question 1 combines several aspects of the appraisal agreement into one question in a way so that a "No" answer could result from the jury's disagreement with only one non-essential portion of the question. The court's question puts the burden on plaintiff to prove that the appraisal agreement contemplated defendant's opinion as to the dollar amount to be realized from 1) a sale 2) of individual items of machinery and equipment...3) under the conditions at a forced sale or liquidation sale. The absence of any one of these factors would lead to a "No" answer. Yet, plaintiff's essential claim that it engaged defendant to appraise the value of the machinery and equipment proposed as collateral for a loan would not be materially affected should the jury find, for example, that while a "forced sale" or other appropriate value was indeed requested, there was no specific meeting of the minds as to the appraisal of individual items of machinery and equipment or the way in which the machinery was to be converted to money. It would be sufficient predicate for finding breach of contract should the jury find simply that defendant agreed to appraise the machinery's value as collateral. And, as explained above, even a jury determination that there was no specific agreement as to the type of appraisal value, or that defendant would supply an "in-place" type appraisal, could lead to a finding in plaintiff's favor in negligence, breach of contract, or both.



Plaintiff also objects to the use in each of the proposed questions of "fair preponderance of the credible evidence" as the applicable standard of proof. The proper formulation is simply "a preponderance of the evidence." (McCormick, Law of Evidence, §339 (2d ed. 1972))

Question 2. This question requires the jury to determine whether defendant breached the contract in either of two ways, one of which purports to include plaintiff's separate negligence claim. As explained above, plaintiff's negligence claim does not depend upon the type of appraisal contract found by the jury. It is a separate claim, involving separate theories of recovery, which merits separate presentation to and consideration by the jury. The "overlap" between plaintiff's theories can be more properly covered by a direction to the jury that a finding of negligence in the first instance must also lead to a finding of breach of contract. If anything, the negligence claim deserves to be the first for the jury's consideration -- not a segment of a breach of contract question improperly dependent on Question No. 1.

Apart from the two possible choices of breach of contract presented in the proposed special verdict, furthermore, plaintiff also claims that defendant simply did not perform an independent professional appraisal, providing its own professional judgment as to the value of the machinery and equipment. This

claim must be included in any such list of choices with respect to breach of contract.

Defendant's version of Question No. 2 is even more objectionable than the Court's. The two theories of breach of contract in defendant's proposed special verdict are presented as an either/or choice. The jury can not even reach the negligence question in defendant's proposed question unless it affirmatively finds as part of the same question that defendant did provide a "forced sale value" appraisal. Not only are the two questions improperly combined, but the jury is prevented from considering defendant's negligence under the other theories advanced by plaintiff, discussed above. Finally, defendant has improperly changed the Court's proper formulation of defendant's duty of care from that "reasonably expected of professionals in the field of appraisal" to the less rigorous "reasonably expected in the circumstances present."

Question 3. This question compounds the confusion caused by a combination of negligence and breach of contract into one question for the jury. Proximate cause is an element of plaintiff's negligence claim. This term has no application at all to the breach of contract claim. If the contract was breached, then plaintiff is entitled to the damages which are the natural and probable consequences of that breach.



Furthermore, the proximate cause which constitutes a part of plaintiff's negligence claim is not accurately stated by the proposed Question No. 3. Plaintiff claims that defendant's negligence was a proximate cause of plaintiff's monetary loss. One element in the chain of causation was plaintiff's reliance on defendant's appraisal in entering into the guarantee of the loan to Time and Micro. Thus, Question 3, as it refers to the "breach of contract" as "a proximate cause of inducing plaintiff's execution of an agreement to guarantee a bank loan to Time and Micro (Ex.       )" is an improper formulation of proximate cause applied to the wrong claim.

Question 4. The Court, by this question, apparently proposes to give the jury the same total discretion in fixing the amount of damages at any amount up to \$161,285.75, as it had in the first trial. If anything can be said to be certain in this case, however, it is that there can be no issue for the jury as to the amount of damages at the second trial. The underlying reason for the Court's decision to set aside the jury's verdict in the first trial awarding plaintiff \$70,000 in damages was that the amount of damages sustained by plaintiff, if any, was fixed and liquidated at \$161,895.75. Despite plaintiff's request that judgment for the full amount of damages be entered, the Court chose to set aside the verdict as inferentially representing a compromise on liability and damages.

Thus, the Court found:

This amount [\$161,895.75] paid by plaintiff, was uncontroverted by defendant at trial and is not questioned at this time. Indeed, defendant has essentially stipulated [emphasis added] this sum as representing the amount of damages, if any, sustained by plaintiff (see Defendant's Memorandum of Law in support of its motion, filed on May 9, 1975, p. 18). Further, in the affidavit of Arnold Stream, defendant's attorney, he states at page 8 that "[t]he liquidated damages in this case were \$161,895.75" Court's Memorandum and Order on Post-Trial Motions, dated May 28, 1975, at p. 4.

Based on the record of the first trial, defendant's unqualified representations, affidavit, and what the Court termed its "stipulation" in its post-trial papers, and the Court's decision setting aside the first verdict, there simply can be no issue for the jury in this case as to the amount of compensatory damages. Of course, plaintiff continues to claim punitive damages, which should be the subject of a separate special verdict question to the jury.

Plaintiff additionally objects to the language of Question 4 in that the damages were not sustained "by reason of executing the said guarantee agreement and honoring the said guarantee agreement," but, rather, by reason of defendant's breach of contract, negligence, or fraud.



Dated: New York, New York  
September 2, 1975

Respectfully submitted,

POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
AJAX HARDWARE MANUFACTURING CO.  
777 Third Avenue  
New York, New York 10017  
(212) 688-3200

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORP.,

: 69 Civil 1900 (RHL)

Plaintiff,

DEFENDANT'S REQUEST FOR  
: PRODUCTION OF DOCUMENTS  
PURSUANT TO RULE 34 F.R.C.P.

-against-

INDUSTRIAL PLANTS CORPORATION, :

Defendant.

-----X

S I R S :

PLEASE TAKE NOTICE that the plaintiff is required to produce and make available for inspection and copying at the offices of the plaintiff, 825 South Ajax Avenue, City of Industry, California, on Friday, October 10, 1975, beginning at 10:00 a.m. on said day, the original or duplicate original counterparts (or copies, if no originals exist) of the following documents and records:

1. All contract documents relating to the engagement of the plaintiff and Time & Micro Instruments, Inc. ("T&M") or either of them by the United States Government, the Department of Defense, or any other Department, branch or agency of the United States Government during 1966 or 1967 with respect to the



manufacturing, production or assembling of fuses, time mechanisms or other products.

2. Any and all correspondence between any of the aforementioned parties, including correspondence between the plaintiff and T&M, relating to and preceding the transaction described in item 1.

3. All memoranda between plaintiff and T&M or by plaintiff or T&M in any way relating to the transaction described in item 1.

4. All correspondence between any of the aforementioned parties, including correspondence between the plaintiff and T&M, relating to and subsequent to the transaction.

5. All documents, instruments and writings relating to the termination or cancellation of the contract described in item 1.

6. All correspondence between any of the aforementioned parties, including correspondence between the plaintiff and T&M, relating to the aforementioned contract termination or cancellation.

7. All documents and related correspondence reflecting and otherwise connected with the termination claim of plaintiff and T&M with respect to the foregoing transaction including (but in no way limited to) the letter of Salvatore J. Desimone, termination

contracting officer, dated 12 July, 1968, addressed to the plaintiff.

8. All checkbooks, checkbook stubs, deposit slips, bank statements, cash receipts ledgers, and other original books and account records of plaintiff reflecting deposits during 1968 and 1969, with the option granted to the plaintiff to produce only those portions thereof which reflect the deposit of funds in connection with the settlement of the termination claim described in the preceding item.

9. All instruments, contract documents and related closing and pre-closing documents, delivered or received, pertaining to the loan, guaranty and security transaction between plaintiff and T&M, on the one hand, and First Western Bank and Trust Company, Los Angeles, California, on the other hand, which took place in 1966.

10. All correspondence between the parties mentioned in item 9 before, during and subsequent to the aforesaid banking transaction, pertaining thereto, including any reports, appraisals and other data supplied to said bank as an adjunct to the

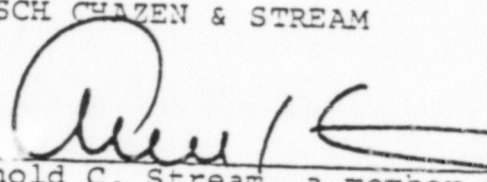


mentioned financial transaction.

Dated: New York, N. Y.  
September 10, 1975

Yours, etc.

MONASCH CHAZEN & STREAM

By   
Arnold C. Stream, a member thereof  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1880

TO: POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----x

: 69 Civil 1900 (RHL)  
:  
: RESPONSE TO  
: DEFENDANT'S REQUEST  
: FOR PRODUCTION OF  
: DOCUMENTS, DATED  
: SEPTEMBER 10, 1975

To: MONASCH, CHAZEN & STREAM  
733 Third Avenue  
New York, New York 10017

SIRS:

In response to Defendant's Request for Production of Documents Pursuant to Rule 34 F.R.C.P., dated September 10, 1975, plaintiff states as follows:

A. Plaintiff objects to the entire request, and each and every part thereof, on the grounds that:

1) Discovery in this action is complete. No further discovery may be had at this time, as defendant could have requested such discovery previously with the exercise of due diligence, and defendant has presented no facts which justify this late application to reopen discovery and the pre-trial order.

2) The requested documents are irrelevant to the issues in this case. There is no issue to be tried as to the amount of plaintiff's compensatory damages as the defendant has admitted



following the first trial of this action that such damages are liquidated and undisputed in the amount of \$161,895.75. The requested documents are further irrelevant to the issues in this case, as framed by the Pre-Trial Order herein, dated January 11, 1974. This and all other objections on the grounds of irrelevancy shall be deemed to include the objection that any such material is not reasonably calculated to lead to the discovery of evidence admissible in this action.

3) Defendant's request constitutes an attempt by defendant to harass, annoy, oppress and burden plaintiff so as to interfere with plaintiff's ability to adequately prepare for the trial of this action, now scheduled to begin on October 6, 1975.

B. Plaintiff further objects to the specific numbered requests as follows:

Request No. 1: Plaintiff objects to the production of the documents requested on the grounds that said documents may contain classified or confidential military information which may not be inspected without the appropriate government security clearance.

Request No. 2: Plaintiff objects to the production of the documents requested for the reason that the correspondence requested is irrelevant even to the issue of plaintiff's claim against or recovery from the United States government as a

result of termination of the aforementioned contract, the purported basis for defendant's discovery demand.

Request No. 3: Plaintiff objects to the production of the documents requested for the same reason as stated in the response to Request 2.

Request No. 4: Plaintiff objects to the production of the documents requested for the same reasons as stated in the response to Request 2, except insofar as the request seeks the same documents as Request No. 7, which is responded to below.

Response to Request No. 5: Plaintiff objects to the production of the requested documents for the same reasons stated in response to Request No. 2, except insofar as the request seeks the same documents as Request No. 7, which is responded to below.

Request No. 6: Plaintiff makes the same response as to Request No. 5.

Request No. 7: Plaintiff will produce the documents described in Paragraph C below, under the conditions described in that paragraph. The other documents requested are irrelevant to defendant's claim that plaintiff received compensation from the government for its loss on its guarantee, since the documents to be produced establish that it did not claim or receive such compensation. Moreover, plaintiff invokes the attorney-client privilege with respect to many of the documents.



Request No. 8: Plaintiff makes the same response as to Request No. 7, except for the attorney-client privilege.

Request No. 9: Plaintiff objects to production of the documents requested as being irrelevant even to the issue of plaintiff's claim against or recovery from the United States government as a result of termination of the aforementioned contract.

Request No. 10: Plaintiff makes the same response as to Request No. 9.

With respect to requests for production of documents as to which plaintiff has objected on the ground of irrelevancy, plaintiff also objects that the search for them would be burdensome and entail expense unwarranted by any apparent relationship which such documents have to any issue in this action.

C. Without prejudice to and without waiver of plaintiff's objections to defendant's Request for Production of Documents, as stated in Paragraphs A and B above, plaintiff will provide to defendant copies of the following documents:

1. Department of Defense Settlement Proposal (DD Form 540) on behalf of Ajax Hardware Corporation, submitted on or about May 9, 1967.
2. Application for Partial Payment (DD Form 548) dated January 24, 1968, with accompanying invoice.

3. "Memorandum of Understanding" dated February 21, 1968.
4. Application for Partial Payment (DD Form 548) dated February 23, 1968, with accompanying invoice.
5. Application for Partial Payment (DD Form 548) dated March 25, 1968, with accompanying invoice.
6. Application for Partial Payment (DD Form 548) dated April 22, 1968, with accompanying invoice.
7. Letter from Royce D. Zant to Salvatore J. DeSimone, dated March 27, 1968.
8. Letter from Salvatore J. DeSimone to Ajax Hardware Corp., dated July 12, 1968.
9. Settlement Proposal (DD Form 541) on behalf of Time & Micro Instruments, Inc., dated December 9, 1968.
10. Settlement Proposal (DD Form 541) on behalf of Time & Micro Instruments, Inc., dated January 30, 1969.
11. Letter from Salvatore J. DeSimone to Ajax Hardware Mfg. Corp., dated March 10, 1969.
12. Letter from Salvatore J. DeSimone to Ajax Hardware Mfg. Corporation, dated March 24, 1969, including attached Invoice, and Modification No. A001 to Contract No. DAAA79-68-C-0039, dated March 24, 1969.

The documents described above will be provided to defendant in connection with a Motion for a Protective Order to be made by plaintiff on September 23, 1975.



Yours, etc.,

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By *William Silver*

A Member of the Firm  
Attorneys for Plaintiff  
AJAX HARDWARE MANUFACTURING CORP.  
777 Third Avenue  
New York, New York 10017  
[212] 688-3200

Dated: New York, New York  
September 22, 1975

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

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69 Civil 1900 (RHL)

MOTION FOR  
PROTECTIVE ORDER  
AND OTHER RELIEF

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Edward A. Drill, sworn to September 23, 1975, defendant's request for production of documents pursuant to Rule 34 F.R.C.P., dated September 10, 1975, the transcript of proceedings held before this Court on September 12, 1975 and all prior pleadings and proceedings had herein AJAX HARDWARE MANUFACTURING CORPORATION, plaintiff in the above-entitled action, will move this Court, before the Honorable Richard H. Levet in Room 2103, United States Courthouse, Foley Square, New York, New York on September 30, 1975, at 10:00 A.M., or as soon thereafter as counsel may be heard, for an order pursuant to Rules 26(c) and 37(a)(4) of the Federal Rules of Civil Procedure that the discovery requested by defendant in its Request for Production of Documents dated September 10, 1975 not be had and that no further discovery in this action be allowed, on the ground that defendant is not



entitled to the requested discovery and that such order is required to protect plaintiff from annoyance, oppression, and undue burden and expense, and for a further order granting to plaintiff the expenses incurred in relation to defendant's request for production of documents and this motion, and for such other and further relief as the Court may deem proper.

Dated: September 23, 1975  
New York, New York

Yours, etc.,

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By \_\_\_\_\_  
A Member of the Firm  
Attorneys for Plaintiff  
AJAX HARDWARE MANUFACTURING  
CORPORATION  
777 Third Avenue  
New York, New York 10017  
[212] 688-3200

To: MONASCH CHAZEN & STREAM  
733 Third Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

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69 Civil 1900 (RHL)

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:  
AFFIDAVIT

-----X  
STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK,

EDWARD A. BRILL, being duly sworn, deposes and says:

1. I am an associate of the firm Poletti Freidin Prashker Feldman & Gartner, attorneys for plaintiff in the above-entitled action, and am fully familiar with the prior proceedings in this matter. I make this affidavit in support of plaintiff's motion for a protective order pursuant to F.R.Civ.P. Rule 26(c), which will terminate defendant's improper attempt to engage in last-minute discovery in this action, an attempt based on the now demonstrably mistaken factual premise that plaintiff received certain payments from the United States government based on the same loan guaranty loss for which plaintiff sues defendant in this case.



2. Upon Mr. Stream's sworn representation to this Court only of his "belief" that plaintiff received compensation from the government for its loss on its guaranty, this Court shortened plaintiff's time to respond to defendant's discovery request. Plaintiff is now able to show by incontestable documentary proof that defendant's attorney, Arnold Stream, Esq. was completely wrong in his forceful assertion to the Court on September 12, 1975, that plaintiff received a contract termination payment from the United States government based, in whole or part, upon its loss of \$161,895.75 on the guarantee of a loan to Time & Micro Instruments, Inc. ("Time & Micro"). Neither plaintiff nor Time & Micro submitted a claim to the government based on that loss, which is the basis of this lawsuit against defendant, nor was any such payment made by the government. This Court, therefore, should put a quick end to defendant's discovery efforts admittedly based entirely upon a "belief" which we now demonstrate to be without any foundation.

3. Defendant's Request for Production of Documents.

On September 10, 1975, defendant served upon plaintiff a Request for Production of Documents Pursuant to F.R.Civ.P. Rule 34. (A copy is annexed hereto as Exhibit 1). This request called in a broad and general way for production of ten categories of documents. The first category requested broadly, all contract documents "relating to the engagement of the plaintiff and Time & Micro Instruments, Inc. ("Time & Micro")

or either of them" by "any agency of the United States Government during 1966 or 1967" "with respect to the manufacturing production or assembling of fuses, time mechanisms or other products." (Emphasis added). Defendant, in Requests Nos. 2, 3, and 4 requested all correspondence and memoranda "in any way relating" to the contracts requested. Requests Nos. 5 and 6 sought documents, instruments, writings, and correspondence relating to termination or cancellation of the government contract or contracts, while Requests Nos. 7 and 8 sought documents related to the termination claim of plaintiff and Time & Micro, and records showing the receipt of funds in settlement of such termination claim. Requests Nos. 9 and 10 sought documents relating, not to government contracts or the termination claim, but to the "loan, guaranty, and security transaction between plaintiff and Time and Micro, on the one hand, and First Western Bank and Trust Company....which took place in 1966," and all related correspondence among these three parties "before, during and subsequent" to that banking transaction. Defendant's request called for production of the documents at plaintiff's offices in City of Industry, California on October 10, 1975. By letter dated September 10, 1975, however, defendant's attorney informed plaintiff that it intended to apply to the Court on September 12 for an order under Rule 34(b) advancing the date for production of the documents to September 18, 1975, without specifying the grounds for the intended application.



4. Defendant's Explanation of Its Discovery Request.

Mr. Stream offered an explanation and supposed justification for defendant's belated discovery request for the first time in sworn testimony before the Court on September 12.\* Attempting to explain why defendant sought this discovery virtually at the last moment before the second trial of this action, Mr. Stream stated that he learned for the first time that week of the existence of government files showing that Ajax had received a government contract for the production of fuses with Time & Micro as a subcontractor, that the contract was cancelled shortly after it was signed, and that upon Mr. Stream's information and belief, Ajax filed a termination claim and received recovery for damages based upon termination of the contract (September 12 Tr., p. 5). In response to questioning by the Court as to the relevance of the discovery requests to the issues in this case, Mr. Stream explained that the requested

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\*Limiting the broad literal language of defendant's request, Mr. Stream described the request as a simple one, stating to the Court that:

"This notice is a notice requiring the plaintiff to produce its copies of the contract, its notice of termination, its claim against the government and its checkbooks to show the receipt of the funds."

(Sept. 12 Transcript, p. 8).

documents related to the issue of damages:

THE COURT: ...I'm a little bit uncertain how that enters into damages between this plaintiff and this defendant. Will you explain that?

MR. STREAM: Yes. We have reason to believe, your Honor, that the claim which was made by Ajax against the government was based upon its economic involvement in the very transaction that brings this case before the Court, namely, the financing of Time & Micro in order to place it in a posture so it could perform the government contract. That financing--

THE COURT: That is, the guarantee was of that character?

MR. STREAM: Precisely. So, your Honor, the exposure of the plaintiff under that guarantee is a part--understand, I speak on information and good belief, we understand that the principal element of the government claim is the exposure of the plaintiff to that economic loss for which they did receive, we understand, a substantial recovery from the government.... (Emphasis added).

(September 12, Tr., pp. 5-7).

Clearly, then, as explained under oath by Mr. Stream, defendant's discovery request was based on and justified by Mr. Stream's belief that "the principal element" of plaintiff's contract termination claim against the government was plaintiff's loss on the guarantee of the loan to Time & Micro. Plaintiff, having no prior knowledge of the explanation Mr. Stream was to offer on September 12, was naturally unable to refute his assertions at that time, and the Court, over the objections of plaintiff, ordered that time for production of documents, or response to



defendant's request, be shortened to September 22, 1975.

5. Deponent's Review of Numerous Documents Requested.

In order to respond to the defendant's request in the short time allowed by the Court's order, I travelled to Los Angeles, California on Wednesday, September 17. On September 18, 1975, I visited the plaintiff's offices in City of Industry, California where I was shown approximately twenty thick files relating to a 1966 contract between plaintiff and the Department of Army Ammunition Procurement Supply Agency for the production of fuses, and to claims arising out of termination of that contract. These files contained a total of many thousands of individual documents, letters and other papers in no apparent order or organization. While I could not possibly review in the time available each item in each file with the care necessary to sort out those items which might be called for under defendant's Notice for Production of Documents, and those which plaintiff was not obligated or willing to disclose, I was able to obtain copies of those documents showing the exact termination claims made by Ajax, on behalf of itself and its subcontractors and the sums received from the government in settlement of those claims. Furthermore, since the individuals involved in the termination claim proceedings are no longer employed by Ajax, on Friday, September 19, 1975 I spoke to Mr. Salvatore DeSimone, the Defense Supply Agency Contract Terminating Officer with responsibility for the termination claims. Mr. DeSimone confirmed to me

what the documents show: Ajax did not claim on behalf of itself or Time & Micro any amount based upon the \$270,000 loan to Time & Micro, or Ajax's loss on the guarantee of that loan of \$161,895.75. The government's termination payments were based solely on specified losses directly traceable to expenses incurred in performing the government contract. Mr. DeSimone offered to confirm this information in an affidavit for this Court, should any proof other than the actual documents be required.

6. Ajax's Termination Claim and Government Payments.

Ajax received a total of \$249,917 in settlement of termination claims submitted by Ajax on behalf of itself and over twenty (20) subcontractors for losses arising out of the termination of Department of Army Contract No. DAA09-67-C-0039. \$152,268.04 of this sum was for Ajax's own expenses and losses caused by the termination without any sum for the guaranty loss; the balance of \$97,648.96 was paid to Ajax on behalf of the claims of the various subcontractors. Without prejudice to its position that it is not required to produce the documents requested by defendant, and without waiving any objections to the production of any such documents, copies of the actual claim documents and payment invoices reflecting the essentials of what was claimed and what was paid on the contract termination are described below and annexed to this affidavit.

a) Ajax's Initial Claim.

On or about May 9, 1967, Ajax submitted its initial claim based upon termination of the Department of the Army



Ammunition Procurement and Supply Agency fuse contract, for which Ajax was the prime contractor. (A copy of this claim, DD Form 540, is annexed hereto as Exhibit 2). Ajax requested a total of \$399,678, including \$131,229 for twenty-two (22) separate subcontractor claims. No claim was included on behalf of Time & Micro at that time. Ajax's own claim did not include any amount representing any loss on the \$270,000 loan guarantee. Indeed, that loss had not yet been suffered. The machinery and equipment held by the bank as collateral for the loan was not sold at auction until October 7, 1967, five months later. Ajax did not pay anything to the bank under its guarantee until May 20, 1968, a year after its claim to the government. The major elements of Ajax's claim, as shown on the actual claim document, were \$8,281 for purchased parts, \$46,115 for dies, jigs, fixtures and special tools, \$135,827 in specified other costs, \$35,469 in general and administrative expenses, \$35,692 in profit, and \$7,065 in settlement expenses. \$131,229 was claimed on behalf of subcontractors, in accordance with the regular procedure whereby the government settles all subcontractor claims directly with the prime contractor.

b) Partial Payments Received.

On August 3 and November 21, 1967, Ajax received two payments of \$50,000 each to be credited against final settlement of Ajax's own claims (no separate invoice or claim was submitted for these sums). An application for partial payment

of \$50,640.01 for specified subcontractor claims was made on January 24, 1968, and paid shortly thereafter. (A copy of the application and invoice are annexed hereto as Exhibit 3).

c) Ajax Proposed Settlement.

On February 21, 1968, Ajax agreed to accept \$151,010.00 as full and final settlement of its own claims, exclusive of subcontractor claims, less the \$100,000 previously received, thus finally reducing the amounts previously claimed. (A copy of this proposal is attached hereto as Exhibit 4). Ajax sought to reserve claims "relating to Time & Micro", which were not included in this settlement proposal. Significantly, this agreement was signed, and the amount of Ajax's claim fixed, three months prior to Ajax's incurring its loss on the loan guarantee.

d) Additional Partial Payments for Subcontractor Claims.

Ajax received additional partial payments for specified subcontractor claims of \$6,237.00 on February 23, 1968, \$18,234.45 on March 25, 1968, and \$2,537.50 on April 22, 1968. (Copies of the payment applications and invoices are annexed hereto as plaintiff's Exhibits 5, 6, and 7 respectively).

e) Addition to Ajax Termination Claim.

On March 27, 1968, Ajax submitted additional claims arising out of specific expenses incurred in the settlement procedures. These claims, totalling \$1,258.00, (added to the \$151,010 previously proposed on February 21, 1968), increased



Ajax's total settlement claim to \$152,268. (A copy of this submission is annexed hereto as Exhibit 8).

f) Request for Submission of Time & Micro Claim.

On July 12, 1968, Mr. Salvatore DeSimone, Termination Contracting Officer, wrote Ajax requesting that a termination claim be submitted on behalf of Time & Micro, and stating that this issue of the Time & Micro termination claim could not be left unresolved in the final settlement of \$152,268 for Ajax claims plus approved subcontractor settlements. (A copy of this letter is annexed hereto as Exhibit 9). It was apparently this letter which Mr. Stream saw two weeks ago, and which he used as a springboard, without any further investigation, for his completely unfounded assumption that the settlement was of Ajax's loan guarantee loss. (See September 12 Tr., p. 42).

g) Submission of and Approval of Time & Micro Claim.

In response to requests by the government for submission of a claim on behalf of Time & Micro, Ajax submitted two claims. The first claim, dated December 9, 1968, was for \$65,170.51. (A copy is annexed hereto as Exhibit 10A). The second claim, dated January 30, 1969, amended the first claim by reducing the claimed amount to \$30,020.86. (A copy is annexed hereto as Exhibit 10B). No part of either claim represented payments for the \$270,000 loan to Time & Micro, or any part of the balance of the loan remaining after the auction sale of the machinery and equipment. On March 10, 1969, Mr. DeSimone wrote

to Ajax approving a proposed settlement of the Time & Micro claim in the amount of \$20,000. (A copy of this letter is annexed hereto as Exhibit 11).

h) Final Settlement of Ajax and Subcontractor Claims.

On March 24, 1969, Mr. DeSimone wrote Ajax, enclosing final settlement papers on the termination claims, and approving a final payment of \$72,258.04 representing the balance of \$52,258.04 for Ajax's own claims, and \$20,000 for the Time & Micro claims. (A copy of the letter and enclosed documents are annexed as Exhibit 12). Ajax thus received a total of \$249,917, including \$152,268.04 for its own claims (including a \$10.00 property disposal credit), and \$97,648.96 for all subcontractor claims (including \$20,000 for the Time & Micro claims) in its capacity as prime contractor.

In sum, the government never reimbursed Ajax or Time & Micro for the loan loss incurred on Ajax's guarantee for Time & Micro -- neither Ajax nor Time & Micro ever claimed reimbursement for that loss. Ajax's own claim of \$268,449, later reduced to \$152,268.04, consisted of expenses wholly unrelated to the Time & Micro loan guarantee, and indeed, was submitted and finalized some three months before Ajax even paid \$161,895.75 -- the claimed damages in this case -- to the bank on May 20, 1968.

7. Defendant is Not Entitled to the Requested Discovery; Plaintiff is Entitled to the Costs of this Motion.

As is demonstrated above, the reason claimed by defendant to necessitate this last minute request for discovery relating to plaintiff's damages does not, in fact, exist, and the



requested discovery should be denied on that simple ground. Discovery in this six-year old action was completed years ago, with a pre-trial order fixing the issues, witnesses, and documentary evidence, signed by the Court and the parties on January 11, 1974. Defendant's attorney has neglected the use of pre-trial discovery procedures available to defendant for six years. Only after a first trial was completed and on the very eve of the second trial, did he suddenly decide that he wished to explore new issues and areas of discovery. Despite Mr. Stream's representation that he made "constant efforts -- not for weeks, but for years" to obtain the documents now sought from plaintiff, defendant never served a notice to produce these documents until now (September 12, Tr. p. 21). Indeed, many of the same documents requested now relating to both the government fuse contract and the loan to Time & Micro were inquired about and requested during the Deposition on Written Questions of Howard Klein, held on February 6, 1973.\*Defendant made no further efforts to obtain such documents when Mr. Klein, no longer an employee of Ajax, was not able to produce them. Despite Mr.

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\*Defendant asked for writings, correspondence, and memoranda relating to Ajax's contract with the government to manufacture fuses. Mr. Klein stated that he believed the documents were in the files of the government and the companies involved. (Cross-Questions 45-52). Defendant further asked for numerous documents related to the loan to Time & Micro (Cross-Questions 54-90).

Stream's professed (and sworn) ignorance concerning the government contract and termination claim until just two weeks ago, moreover, he specifically referred to the same supposed claims during his summation to the jury in the first trial of this case.\* If Mr. Stream believed those statements to be true at the time, there can be no excuse for his delay in instituting this discovery request until three weeks prior to the start of the second trial, and more than three months after the first verdict in plaintiff's favor was set aside and a new trial ordered by this Court.

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\*Mr. Stream stated:

"They still didn't show [sic] you the check that they had to pay to the bank but we don't know what they got back from Uncle Sam on the fuse contract.

We don't know whether they recovered the loss and I submit to you they are under a duty to disclose to this jury what happened in that connection and you have a right to infer that there is something spooky going on or they would have."

(Transcript of Summation, April 30, 1975, pp. 69-70).

The Court later instructed the jury to disregard Mr. Stream's comments concerning a possible recovery from the government:

"The fact that the plaintiff may or may not have gotten some sort of settlement from the Government with regard to any fuse contract is not an issue in this case, and it is immaterial."

(Transcript of Court's Charge, April 30, 1975, pp. 31-32).



If defendant had proceeded in a reasonably diligent manner with its request for production of documents related to plaintiff's contract termination claim, plaintiff could have demonstrated the false basis of defendant's application without the expense of an emergency trip to California to obtain and view the pertinent documents which are annexed to this affidavit. Plaintiff's expenses on this motion, necessitated by defendant's delay until the last moment in filing its unfounded and unsupported discovery request, resulting in maximum harrassment, oppression and burden to plaintiff as it attempts to prepare for the trial of this matter, should, therefore, be borne by the defendant as Rules 26(c) and 37(a)(4) of the Federal Rules of Civil Procedure provide.

Edward A. Brill  
EDWARD A. BRILL

Sworn to before me this  
23rd day of September, 1975

[Signature]  
NOTARY PUBLIC, STATE OF NEW YORK

EXHIBIT 1 TO EDWARD BRILL'S AFFIDAVIT

DEFENDANT'S REQUEST FOR  
PRODUCTION OF DOCUMENTS  
PURSUANT TO RULE 34 F.R.C.P.

Reproduced at Pages:

A-161 TO A-164



# EXHIBIT 2 TO EDWARD BRILL'S AFFIDAVIT

DEPARTMENT OF DEFENSE		SETTLEMENT PROPOSAL (Inventory Basis)		Form Approved Digest Bureau No. 22-1081		
FOR USE BY A FIXED-PRICE PRIME CONTRACTOR OR FIXED-PRICE SUBCONTRACTOR						
THIS PROPOSAL APPLIES TO (Check one)		COMPANY				
<input checked="" type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT		<input type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER				
SUBCONTRACT OR PURCHASE ORDER NO(S)		AJAX HARDWARE CORPORATION				
CONTRACTOR WHO SENT NOTICE OF TERMINATION		STREET ADDRESS				
NAME		825 SO. AJAX AVENUE				
ADDRESS		CITY AND STATE				
		CITY OF INDUSTRY, CALIF. 91747				
		NAME OF GOVERNMENT AGENCY Department of the Army				
		Ammunition Procurement & Supply Agency				
		GOVERNMENT PRIME CONTRACT NO.		CONTRACTOR'S REFERENCE NO.		
		DAAA09-67-C-0039		3500		
IF MONIES PAYABLE UNDER THE CONTRACT HAVE BEEN ASSIGNED, GIVE THE FOLLOWING		EFFECTIVE DATE OF TERMINATION				
NAME OF ASSIGNEE		January 3, 1967				
ADDRESS		PROPOSAL NO.		CHECK ONE		
		1		<input checked="" type="checkbox"/> INTERIM <input type="checkbox"/> FINAL		
DD FORM 146 (Schedule of Accounting Information) <input checked="" type="checkbox"/> IS <input type="checkbox"/> IS NOT ATTACHED. (If not, explain)						
SECTION I—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION						
PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER	PREVIOUSLY SHIPPED AND INVOICED	FINISHED		UNFINISHED OR NOT COMMENCED		TOTAL COVERED BY CONTRACT OR ORDER
		PAYMENT TO BE RECEIVED THROUGH INVOICING	INCLUDED IN THIS PROPOSAL	TO BE COMPLETED (Partial termination only)	NOT TO BE COMPLETED	
(a)	(b)	(c)	(d)	(e)	(f)	(g)
Fuze, PD, M524A5, MPTS	Quantity				500,000	500,000
	\$				3,018,000	3,018,000
	Quantity					
	\$					
	Quantity					
	\$					
SECTION II—PROPOSED SETTLEMENT						
NO.	ITEM	(Use Columns (b) and (c) Only Where Previous Proposal Has Been Filed)		TOTAL PROPOSED TO DATE	FOR USE OF CONTRACTING AGENCY ONLY	
		TOTAL PREVIOUSLY PROPOSED	INCREASE OR DECREASE BY THIS PROPOSAL			
(a)	(b)	(c)	(d)	(e)		
1	METALS (from DD Form 143)					
2	RAW MATERIALS (other than metals) (from DD Form 143)					
3	PURCHASED PARTS (from DD Form 143)					
4	FINISHED COMPONENTS (from DD Form 143) (See Schedule A)			8,281		
5	MISCELLANEOUS INVENTORY (from DD Form 143)					
6	WORK IN PROCESS (from DD Form 144) (See Schedule A)					
7	DIES, JIGS, FIXTURES AND SPECIAL TOOLS (DD Form 145)					
8	OTHER COSTS (from Schedule B)			46,115		
9	GENERAL AND ADMINISTRATIVE EXPENSES (from Schedule C)			135,327		
10	TOTAL (Items 1 to 9 inclusive)			35,469		
11	PROFIT (explain in Schedule D)			225,692		
12	SETTLEMENT EXPENSES (from Schedule E)			35,692		
13	TOTAL (Items 10 to 12 inclusive)			7,065		
14	REDUCTION FOR SUBCONTRACTORS (from Schedule F)			268,449		
15	ACCEPTABLE FINISHED PRODUCT (from DD Form 143)			131,229		
16	GROSS PROPOSED SETTLEMENT (Items 13 thru 15)			399,678		
17	DISPOSAL AND OTHER CREDITS (from Schedule G)					
18	NET PROPOSED SETTLEMENT (Item 16 less 17)					
19	ADVANCE, PROGRESS & PARTIAL PAYMENTS (from Schedule H)					
20	NET PAYMENT REQUESTED (Item 18 less 19)			399,678		

DD FORM 1 APR 57 540

REPLACES DD FORM 146, 1 MAR 54, WHICH IS OBSOLETE.

SCHEDULE A—ANALYSIS OF INVENTORY COST (Items 4 and 6)				
Furnish the following information (unless not reasonably available) in respect to inventories of finished components and work in process included in this proposal:				
FINISHED COMPONENTS	TOTAL DIRECT LABOR	TOTAL DIRECT MATERIALS	TOTAL INDIRECT EXPENSES	TOTAL
WORK IN PROCESS				-0-
SCHEDULE B—OTHER COSTS (Item 8)				
ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY	
Direct Engineering & clerical labor	Includes payroll related expenses	7,444		
Expense for set-up of major sub-contractor	Establishing Time & Micro	15,313		
Advance payment on tooling	Payment to vendor	3,425		
Factory costs	Direct & allocated factory and preparatory costs	38,436		
Rent commitment	Rent & related costs of space acquired for contract	27,353		
Severance pay	Program Manager	2,258		
Liaison & contract Adm. Expense		41,457		
Freight on leased equipment		81		
TOTAL		135,827		
SCHEDULE C—GENERAL AND ADMINISTRATIVE EXPENSES (Item 9)				
DETAIL OF EXPENSES		AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY	
G & A rate of 12.94% applied to:				
Purchased parts inventory	\$ 8,281			
Dies, jigs, fixtures & special tools	46,115			
Other costs	\$ 135,827			
Less: Liaison & contract Adm. Expense	(41,457)			
Less: Direct legal fees	( 5,889)	88,481		
Claims of Sub-contractors		131,229		
TOTAL		274,106	35,469	
SCHEDULE D—PROFIT (Item 11)				
EXPLANATION		AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY	
10% of line 10 of Page 1 of DD 540 (\$225,692)		22,569		
10% of line 14 of Page 1 of DD 540 (\$131,229)		13,123		
		35,692		



SCHEDULE E—SETTLEMENT EXPENSES (Item 12)			
ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Settlement labor	Includes occupancy charge	5,639	
Legal fees	Jack Paul	1,240	
Sub-Total		6,879	
G & A, 2.70%		186	
		7,065	
These amounts are subject to increase for additional costs			
SCHEDULE F—IMMEDIATE SUBCONTRACTORS AND SUPPLIERS (Item 14)			
NAME AND ADDRESS OF SUBCONTRACTOR	BRIEF DESCRIPTION OF PRODUCT CANCELLED	AMOUNT OF CLAIM	FOR USE OF CONTRACTING AGENCY ONLY
See attached schedule of claims		131,229	
NOTE: Claims not yet received are excluded			
SCHEDULE G—DISPOSAL AND OTHER CREDITS (Item 17)			
DESCRIPTION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY	
<small>(If practicable, show separately amount of disposal credits applicable to acceptable finished products included in Item 13)</small> NOTE.—Individual items of small amounts may be grouped into a single entry in Schedules B, C, D, E, and G. WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES			

SCHEDULE H—ADVANCE, PROGRESS AND PARTIAL PAY			
DATE	TYPE OF PAYMENT	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

CERTIFICATE

THE UNDERSIGNED, individually and as an authorized representative of the contractor, certifies that he has examined this settlement proposal and that, to the best of his knowledge and belief:

(1) AS TO CONTRACTOR'S OWN CHARGES.—The proposed settlement (*exclusive of charges set forth in Item 14*) and supporting schedules and explanations have been prepared from the books of account and records of the contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States or an agency thereof; and the charges as stated are fair and reasonable.

(2) AS TO SUBCONTRACTORS' CHARGES.—(a) The contractor has examined, or caused to be examined, to an extent it considered adequate in the circumstances, the claims of its immediate subcontractors (*exclusive of claims filed against such immediate subcontractors by their subcontractors*); (b) The settlements on account of immediate subcontractors' own charges are fair and reasonable, said charges are allocable to the terminated portion of this contract and said settlements were negotiated in good faith and are not more favorable to its immediate subcontractors than those which the contractor would make if reimbursement by the Government were not involved; (c) the contractor has received from all its immediate subcontractors appropriate certificates with respect to their claims, which certificates are substantially in the form of this certificate; and (d) the contractor has no information leading it to doubt (i) the reasonableness of the settlements with more remote subcontractors or (ii) that the charges for them are allocable to this contract. Upon receipt by the contractor of amounts covering settlements with its immediate subcontractors, the contractor will pay or credit them promptly with the amounts so received, to the extent that it has not previously done so. The term "subcontractor" as used above includes suppliers.

<small>NAME OF CONTRACTOR</small> <b>AJAX HARDWARE CORPORATION</b>	<small>BY (Signature of authorized official)</small> <div style="border-bottom: 1px solid black; height: 20px; width: 100%;"></div>
<small>NAME OF SUPERVISORY ACCOUNTING OFFICIAL</small> <b>Stanley Goldsmith</b>	<small>TITLE</small> <b>Controller</b>



DD Form 540

SCHEDULE F - Settlements with Immediate Subcontractors & Suppliers (item 14)

Name and Address of Subcontractor	Brief Description of product cancelled	Amount of Settlement
W. L. Chapman Co., Inc. 2886 E. Walnut St. Pasadena, California 91107	Booster Cup (DD Form 540 P/N 8797516 (Less: Advance 3,485.00 ) 3,809.87 )	3,809.87
Revere Copper & Brass, Inc. Rome Mfg. Co. Division Railroad Street Rome, N.Y. 13440	Alum. Fuse Body P/N 920571	28,532.19
Minitac Corporation 30 Bank Street Morristown, N.J. 07960	Plate, Index P/N 8886950 (die for)	825.00
Minitac Corporation 30 Bank Street Morristown, N.J. 07960	Plate, Retaining P/N 8797537 (die for)	2,300.00
Sierra Screw Products 415 South Motor Avenue Azusa, California	Striker Dwg. #8797604	20,887.02
Sierra Screw Products 415 South Motor Avenue Azusa, California	Body Dwg. #8797535	23,422.59
American Laubscher Corporation 250 W. 57th Street New York, N.Y. 10019	Pinion Second Wheel P/N 8797571	642.95
American Laubscher Corporation 250 W. 57th Street New York, N.Y. 10019	Drive Shaft P/N 8797576	1,090.20
American Laubscher Corporation 250 W. 57th Street New York, N.Y. 10019	Pinion, Esc. Wheel P/N 8797579	641.60
American Laubscher Corporation 250 W. 57th Street New York, N.Y. 10019	Shaft, Balance P/N 8797567	561.85

Form 540

SCHEDULE F - Settlements with Immediate Subcontractors & Suppliers (item 14) (Continued)

Name and Address of Subcontractor	Brief Description of product cancelled	Amount of Settlement
Fastener Distributors Co. 160 Clay Street Hackensack, N.J. 07601	Screw, Type "F" MS 24628-1	258.87
Fastener Distributors Co. 160 Clay Street Hackensack, N.J. 07601	Pin Spring MS 16562-212	89.25
Hunter Spring Division Ametek, Inc. 1 Spring Avenue Hatfield, Pa.	Power Springs P/N 7697540	4,543.30
Hunter Spring Division Ametek, Inc. 1 Spring Avenue Hatfield, Pa.	Pull Wire Assembly P/N 9205733	899.01
C.E.M. Co., Inc. 24 School Street Danielson, Conn.	Spiral Spring Pins P/N 8797536	935.00
National Rivet & Mfg. Co. Waupun, Wisconsin	Pin, Striker Guide P/N 8797594 Rev "E"	)
	Pin, Safety P/N 8797593 Rev "E"	)
	Pin, Mech. Locating P/N 8797591 Rev "E"	)
		128.00
Zila Manufacturing Corp. 16201 So. Broadway Gardena, Calif. 90247	Striker Plug P/N 8797595 Rev "E"	75.00
Kaddis Manufacturing Corp. 300-316 Hudson Avenue Rochester, N.Y. 14605	Rivet P/N 8797566	85.00
The Fossan Company 73 Arch Street Greenwich, Conn.	Cap, Detonator P/N 8797533	1,902.50



orm 540

SCHEDULE F - Settlements with Immediate Subcontractors & Suppliers (Item 14) (Continued)

<u>Name and Address of Subcontractor</u>	<u>Brief Description of product cancelled</u>	<u>Amount of Settlement</u>
The Torrington Company Specialties Division 59 Field Street Torrington, Conn. 06790	Screw Machine Cams P/N 8797569	75.00
Zimney Corporation 160 Taylor Street Monrovia, California 91016	Body, Arming Mechanism P/N 8797535 Rev "D"	14,366.00
Chandler Leasing Corporation 69 Hickory Drive Waltham, Mass. 02154	Lease agreement on special tooling and equipment	25,159.25
		<u>\$ 131,229.45</u>

## EXHIBIT 3 TO EDWARD BRILL'S AFFIDAVIT

## APPLICATION FOR PARTIAL PAYMENT

Form Approved  
Budget Bureau No. 22-8072

For use by Prime Contractor or Subcontractor under contracts terminated for the convenience of the Government

THIS APPLICATION APPLIES TO (Check one) <input checked="" type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT <input type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER		APPLICANT <b>AJAX HARDWARE CORPORATION</b>	
SUBCONTRACT OR PURCHASE ORDER NUMBER(S)		STREET ADDRESS <b>825 So. Ajax Avenue</b>	
CONTRACTOR WHO SENT NOTICE OF TERMINATION		CITY AND STATE <b>City of Industry, California 91747</b>	
NAME		NAME OF GOVERNMENT AGENCY <b>Department of the Army</b>	
ADDRESS		Ammunition Procurement & Supply Agency	
IF CONTRACTOR HAS GUARANTEED LOANS OR HAS ASSIGNED MONIES DUE UNDER THE CONTRACT, GIVE THE FOLLOWING:		GOVERNMENT PRIME CONTRACT NUMBER <b>DAAA-09-67-C-0039</b>	
NAME AND ADDRESS OF FINANCING INSTITUTION		CONTRACTOR'S REFERENCE NUMBER <b>3500</b>	
NAME AND ADDRESS OF GUARANTOR		EFFECTIVE DATE OF TERMINATION <b>January 3, 1967</b>	
NAME AND ADDRESS OF ASSIGNEE		DATE OF THIS APPLICATION <b>January 24, 1968</b>	
		AMOUNT REQUESTED <b>\$ 50,640.01</b>	
		APPLICATION NUMBER UNDER THIS TERMINATION <b>3</b>	

## SECTION I.—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION

PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER (a)	PREVIOUSLY SHIPPED AND INVOICED (b)	FINISHED ON HAND		UNFINISHED OR NOT COMMENCED		TOTAL COVERED BY CONTRACT OR ORDER (g)
		Payment To Be Received Through Invoicing (c)	Included In This Application (d)	To Be Completed (e)	Not To Be Completed (f)	
Fuze, PD, M524A5, MPTS	QUANTITY				500,000	500,000
	\$				3,018,000	3,018,000
	QUANTITY					
	\$					
	QUANTITY					
	\$					

SECTION II.—APPLICANT'S OWN TERMINATION CHARGES  
(Exclusive of his Subcontractors' Charges)

## SETTLEMENT PROPOSAL

☐ ATTACHED  
☒ PREVIOUSLY SUBMITTED

NO	ITEM	CHARGES AS LISTED IN SETTLEMENT PROPOSAL
1	ACCEPTABLE FINISHED PRODUCT (at contract price)	\$
2	WORK IN PROCESS	
3	RAW MATERIALS, PURCHASED PARTS, AND SUPPLIES	
4	GENERAL AND ADMINISTRATIVE EXPENSE	
5	TOTAL (sum of lines 1, 2, 3, and 4)	\$
6	TOOLS, DIES, JIGS, FIXTURES, ETC.	
7	OTHER COSTS	
8	SETTLEMENT EXPENSES	
9	TOTAL (sum of lines 5, 6, 7, and 8)	\$ 150,000.00
10	SUBCONTRACTOR SETTLEMENTS APPROVED BY CONTRACTING OFFICER OR SETTLED UNDER A DELEGATION OF AUTHORITY AND PAID BY APPLICANT	\$ 50,640.01
AMOUNTS RECEIVED		
a	UNLIQUIDATED PARTIAL, PROGRESS, AND ADVANCE PAYMENTS RECEIVED	\$ 100,000.00
b	DISPOSAL AND OTHER CREDITS	
c	TOTAL (sum of lines a and b)	100,000.00
d	AMOUNT OF PARTIAL PAYMENT REQUESTED	50,640.01
e	TOTAL (sum of lines c and d)	\$ 150,640.01



## SECTION III.—AGREEMENT OF APPLICANT

IN CONSIDERATION OF AN ( PARTIAL PAYMENT WHICH MAY BE MADE, THE APPLICANT AGREES AS FOLLOWS:

(1) REPAYMENT OF EXCESS.—If any partial payment made to the contractor is in excess of the amount finally determined to be due on its termination claim, the excess shall be repaid to the Government upon demand, with interest at the rate of 6 percent per annum. Interest shall be computed for the period from the date of the excess payment to the date of repayment, except that (i) no interest shall be charged for any such excess payment attributable to a reduction in the contract termination claim by reason of retention or other disposition of termination inventory, until 10 days after the date of such retention or disposition, or such later date as determined by the contracting officer by reason of the circumstances, and (ii) no interest shall be charged for overpayment under cost-reimbursement type research and development contracts (*without profit or fee to*

*the contractor*) if the overpayments are repaid to the Government within 30 days after demand.

(2) PROMPT SETTLEMENT OF CLAIM.—The applicant will make every reasonable effort to expedite final settlement of the termination claim and the claims of its subcontractors, if any.

(3) DISPOSAL AND RETENTION OF INVENTORY.—Whenever the amount of any proceeds hereafter received by the applicant on the disposal of termination inventory, plus the cost or agreed value, as the case may be, of any termination inventory which the applicant hereafter elects to retain, exceeds the amount stated by the applicant in this application as the amount of his charges (*Section II, Line 9*) and the amount of such credits has not been included on Section II, Line b (*Disposal and Other Credits*), the applicant within 10 days will notify the contracting agency of the amount of credits on account of such inventory disposal or retention.

## SECTION IV.—CERTIFICATE OF APPLICANT

The undersigned certifies that the amount of his own charges (*exclusive of subcontractors' charges*) <sup>as of</sup> ~~DATA-09-67-C-~~ 0039 the date of this application and allocable to the terminated portion of its contract Number \_\_\_\_\_, dated October 19, 1966 U.S. ARMY, is not less than \$ 150,000.00; that, to <sub>(From Sec. II, Line 9)</sub> the best of applicant's knowledge, the amounts received are as set forth above; and that the applicant has not assigned any moneys payable under this contract, except as set forth above.

NAME OF APPLICANT

AJAX HARDWARE CORPORATION

BY (Signature of authorized official)

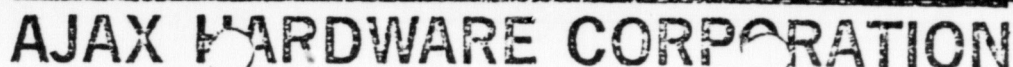
TITLE

Controller

DATE

1-24-68

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES



825 SOUTH AJAX AVE., CITY OF INDUSTRY, CALIF. 91747

213. YOrktown 4-1261  
CUmberland 3-7117

INVOICE DATE

1	74	68
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WE'VE SHIPPED

SOLD TO :

SAME AS  
SHIPPED TO  
UNLESS  
SPECIFIED

DISBURSING OFFICER  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION  
11099 SO. LA CIENEGA BLVD.  
LOS ANGELES, CALIFORNIA 90045

INVOICE NO.

10100-2

~~PLEASE PAY FROM THIS INVOICE~~

NOV 20 1964

TERMS 1977

2% 10 E.O.M. NET 30 DAYS  
XXXXXXXXXXXXXXXXXXXX  
PAYABLE TO THE ORDER OF

STATE	CUST NO	TER
-------	---------	-----

TO :

K O R D E R E D : ➔ F R O M

CUSTOMER ORDER NUMBER

SHIP

DAAA-09-67-C-0039

DATE  
RECEIVED

ROUTING

ACK ORDERED	SHIPPED	%	UNIT	STOCK NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
					CANCELLATION CHARGES PER OUR SETTLEMENT AGREEMENT WITH THE FOLLOWING SUB-CONTRACTORS:		50,640.01
					Zimney Corporation	\$ 6,490.00	
					Revere Copper & Brass, Inc.	23,581.70	
					The Fosson Company	1,870.42	
					The Torrington Company	75.00	
					Minitec Corp.	2,444.17	
					American Laubscher Corp.	2,936.60	
					Fastener Distributors Co.	250.00	
					C.E.M. Co., Inc.	264.12	
					National Rivet & Mfg. Co.	68.00	
					Zila Manufacturing Corp.	75.00	
					Kaddis Mfg. Corp.	85.00	
					Sierra Screw Products	<u>12,500.00</u>	
						\$50,640.01	
					<p>The payment covered by this voucher is a partial payment on account of the Contractor's termination claim under Contract No. DAAA-09-67-C-0039, made pursuant to Section VIII of the Armed Services Procurement Regulation.</p> <p><i>Sue</i></p> <p><i>PP</i></p>		

8% ADDITIONAL CHARGE FOR BROKEN CASES

NUMERICAL FILE

TOTAL AMOUNT → 50,640.1

A-197



EXHIBIT 4 TO EDWARD BRILL'S AFFIDAVIT

MEMORANDUM OF UNDERSTANDING

Ajax Hardware Corporation will accept \$151,010.00 as full and final settlement of their claim against the Government exclusive of Sub-Contractor claims in connection with the convenience termination of Contract DAAA09-67-C-0039 less the \$100,000 previously paid by the Government. Ajax is not entitled to any further termination settlement expenses within its own organization incurred in connection with the settlement negotiations of subcontractors' claims.

The total amount paid to Ajax to date amounts to \$150,640.01 of which \$50,640.01 applies to Sub-Contractors' claims as approved by the Termination Contracting Officer.

The disbursement of \$150,640.01 is as follows:

Ajax Hardware Corporation	\$ 100,000.00
Revere Copper & Brass, Inc.	23,581.70
Sierra Screw Products	12,500.00
Zimney Corporation	6,490.00
The Fosson Company	1,870.42
Minitac Corporation	2,444.17
American Laubscher Corporation	2,936.60
Fastener Distributors	250.00
C.E.M. Company, Inc.	264.12
The Torrington Company	75.00
National Rivet & Mfg. Company	68.00
Zila Manufacturing Corp.	75.00
Kaddis Manufacturing Corporation	85.00
Total	\$ 150,640.01

The rights and liabilities of the parties under the Contract are hereby reserved as to the claim relating to Time and Micro including but not limited to the \$5,000 advance by Ajax to Time and Micro.

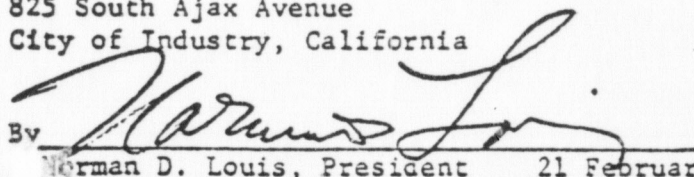
Claim by Ajax for attorneys fees resulting from litigation with Sub-Contractors (excluding Time and Micro) is hereby waived.

The claim for refund by Ajax of customs duty paid by Ajax in the amount of \$2,887.00, which Ajax is entitled to retain in the event of recovery but which, if denied, shall not be a basis for an increase in the termination settlement.

Ajax also agrees to vigorously pursue the settlement of the remaining Sub-Contractors claims and if necessary will assign the right to the Government to directly settle and pay the Sub-Contractor upon the Government's demand.

Ajax Hardware Manufacturing Corporation  
825 South Ajax Avenue  
City of Industry, California

By



Norman D. Louis, President

21 February 1968

## EXHIBIT 5 TO EDWARD BRILL'S AFFIDAVIT

DEPARTMENT OF DEFENSE  
APPLICATION FOR PARTIAL PAYMENTForm Approved.  
Budget Bureau No. 22-8077.

For use by Prime Contractor or Subcontractor under contracts terminated for the convenience of the Government

THIS APPLICATION APPLIES TO (Check one) <input checked="" type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT <input type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER		APPLICANT AJAX HARDWARE CORPORATION	
SUBCONTRACT OR PURCHASE ORDER NUMBER(S)		STREET ADDRESS 825 South Ajax Avenue	
CONTRACTOR WHO SENT NOTICE OF TERMINATION		CITY AND STATE City of Industry, California 91747	
NAME			
ADDRESS			
IF CONTRACTOR HAS GUARANTEED LOANS OR HAS ASSIGNED MONIES DUE UNDER THE CONTRACT, GIVE THE FOLLOWING:		NAME OF GOVERNMENT AGENCY Department of the Army Ammunition Procurement & Supply Agency	
NAME AND ADDRESS OF FINANCING INSTITUTION		GOVERNMENT PRIME CONTRACT NUMBER DAAA-09-67-C-0039	
NAME AND ADDRESS OF GUARANTOR		CONTRACTOR'S REFERENCE NUMBER 3500	
NAME AND ADDRESS OF ASSIGNEE		EFFECTIVE DATE OF TERMINATION January 3, 1967	DATE OF THIS APPLICATION February 23, 1968
		AMOUNT REQUESTED \$ 6,237.00	APPLICATION NUMBER UNDER THIS TERMINATION 4

## SECTION I - STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION

PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER		PREVIOUSLY SHIPPED AND INVOICED	FINISHED		UNFINISHED OR NOT COMMENCED		TOTAL COVERED BY CONTRACT OR ORDER
			ON HAND		To Be Completed	Not To Be Completed	
			Payment To Be Received Through Invoicing	Included In This Application			
(a)		(b)	(c)	(d)	(e)	(f)	(g)
Fuze , PD , M524A5 , MPTS	QUANTITY					500,000	500,000
	\$					3,018,000	3,018,000
	QUANTITY						
	\$						
	QUANTITY						
	\$						

SECTION II.—APPLICANT'S OWN TERMINATION CHARGES  
(Exclusive of his Subcontractors' Charges)

## SETTLEMENT PROPOSAL

☐ ATTACHED☒ PREVIOUSLY SUBMITTED

NO.	ITEM	CHARGES AS LISTED IN SETTLEMENT PROPOSAL
1	ACCEPTABLE FINISHED PRODUCT (at contract price)	\$
2	WORK IN PROCESS	
3	RAW MATERIALS, PURCHASED PARTS, AND SUPPLIES	
4	GENERAL AND ADMINISTRATIVE EXPENSE	
5	TOTAL (sum of lines 1, 2, 3, and 4)	\$
6	TOOLS, DIES, JIGS, FIXTURES, ETC.	
7	OTHER COSTS	
8	SETTLEMENT EXPENSES	
9	TOTAL (sum of lines 5, 6, 7, and 8)	\$ 151,010.00
10	SUBCONTRACTOR SETTLEMENTS APPROVED BY CONTRACTING OFFICER OR SETTLED UNDER A DELEGATION OF AUTHORITY AND PAID BY APPLICANT	\$ 56,877.01

## AMOUNTS RECEIVED

a	UNLIQUIDATED PARTIAL, PROGRESS, AND ADVANCE PAYMENTS RECEIVED	\$
b	DISPOSAL AND OTHER CREDITS	
c	TOTAL (sum of lines a and b)	
d	AMOUNT OF PARTIAL PAYMENT REQUESTED	6,237.00
e	TOTAL (sum of lines c and d)	\$ 6,237.00



### SECTION III.—AGREEMENT OF APPLICANT

IN CONSIDERATION OF ANY PARTIAL PAYMENT WHICH MAY BE MADE, THE APPLICANT AGREES AS FOLLOWS:

(1) REPAYMENT OF EXCESS.—If any partial payment made to the contractor is in excess of the amount finally determined to be due on its termination claim, the excess shall be repaid to the Government upon demand, with interest at the rate of 6 percent per annum. Interest shall be computed for the period from the date of the excess payment to the date of repayment, except that (i) no interest shall be charged for any such excess payment attributable to a reduction in the contract termination claim by reason of retention or other disposition of termination inventory, until 10 days after the date of such retention or disposition, or such later date as determined by the contracting officer by reason of the circumstances, and (ii) no interest shall be charged for overpayment under cost-reimbursement type research and development contracts (*without profit or fee to*

*the contractor*) if the overpayments are repaid to the Government within 30 days after demand.

(2) PROMPT SETTLEMENT OF CLAIM.—The applicant will make every reasonable effort to expedite final settlement of the termination claim and the claims of its subcontractors, if any.

(3) DISPOSAL AND RETENTION OF INVENTORY.—Whenever the amount of any proceeds hereafter received by the applicant on the disposal of termination inventory, plus the cost or agreed value, as the case may be, of any termination inventory which the applicant hereafter elects to retain, exceeds the amount stated by the applicant in this application as the amount of his charges (*Section II, Line 9*) and the amount of such credits has not been included on *Section II, Line b (Disposal and Other Credits)*, the applicant within 10 days will notify the contracting agency of the amount of credits on account of such inventory disposal or retention.

### SECTION IV.—CERTIFICATE OF APPLICANT

The undersigned certifies that the amount of his own charges (*exclusive of subcontractors' charges*) due as of **DAAA-09-67-C-0039** the date of this application and allocable to the terminated portion of its contract Number \_\_\_\_\_, dated October 19, 1966, with U.S. Army, is not less than \$ 150,000.00; that, to (From Sec. II, Line 9) the best of applicant's knowledge, the amounts received are as set forth above; and that the applicant has not assigned any moneys payable under this contract, except as set forth above.

NAME OF APPLICANT

AJAX HARDWARE CORPORATION

BY (Signature of authorized official)

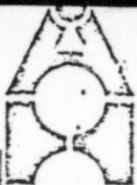
TITLE

CONTROLLER

DATE

2-23-68

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES



# AJAX HARDWARE CORPORATION

825 SOUTH AJAX AVE., CITY OF INDUSTRY, CALIF. 91747

213- YORKTOWN 4-1261  
CUMBERLAND 3-7117

INVOICE NO.

10100-3

SOLD TO :

SAME AS  
SHIPPED TO  
UNLESS  
SPECIFIED

DISBURSING OFFICER  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION  
11099 South La Cienega Boulevard  
Los Angeles, California 90045

PLEASE PAY FROM THIS INVOICE  
NOTE: ALL PAYMENTS MUST BE MADE TO THE  
CREDIT OF THE DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION, LOS ANGELES, CALIFORNIA  
UNLESS OTHERWISE SPECIFIED

SHIP TO :

TERMS

STATE	CUST. NO.	TERM

ORDERED FROM	CUSTOMER ORDER NUMBER	SHIP	DATE RECEIVED
	DAAA-09-67-C-0039		

ROUTING

ORDERED	SHIPPED	%	UNIT	STOCK NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
					CANCELLATION CHARGES PER OUR SETTLEMENT AGREEMENT WITH THE FOLLOWING SUB-CONTRACTOR:		6 237 00
					W. L. CHAPMAN CO. INC.	\$6,237.00	
					The payment covered by this voucher is a partial payment on account of the Contractor's termination claim under Contract No. DAAA-09-67-C-0039 made pursuant to Section VIII of the Armed Services Procurement Regulation.		
					<i>See pp</i>		

5% ADDITIONAL CHARGE FOR BROKEN CASES

NUMERICAL FILE A-201

TOTAL AMOUNT →

6 237 00



## EXHIBIT 6 TO EDWARD BRILL'S AFFIDAVIT

DEPARTMENT OF DEFENSE  
APPLICATION FOR PARTIAL PAYMENTForm Approved  
Budget Bureau No. 22-R072

For use by Prime Contractor or Subcontractor under contracts terminated for the convenience of the Government

THIS APPLICATION APPLIES TO (Check one)

☒ IF PRIME CONTRACT WITH  
THE GOVERNMENT☐ SUBCONTRACT OR  
PURCHASE ORDER

SUBCONTRACT OR PURCHASE ORDER NUMBER(S)

APPLICANT

AJAX HARDWARE CORPORATION

STREET ADDRESS

825 South Ajax Avenue

CITY AND STATE

City of Industry, California 91747

CONTRACTOR WHO SENT NOTICE OF TERMINATION

NAME

ADDRESS

IF CONTRACTOR HAS GUARANTEED LOANS OR HAS ASSIGNED MONIES DUE UNDER THE CONTRACT, GIVE THE FOLLOWING:

NAME AND ADDRESS OF FINANCING INSTITUTION

NAME AND ADDRESS OF GUARANTOR

NAME AND ADDRESS OF ASSIGNEE

NAME OF GOVERNMENT AGENCY Department of the Army  
Ammunition Procurement and Supply Agency

GOVERNMENT PRIME CONTRACT NUMBER

DAAA09-67-C-0039

CONTRACTOR'S REFERENCE NUMBER

3500

EFFECTIVE DATE OF TERMINATION

January 3, 1967

DATE OF THIS APPLICATION

25 March 1968

AMOUNT REQUESTED

\$ 18,234.45

APPLICATION NUMBER UNDER THIS TERMINATION

6

## SECTION I.—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION

PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER  (a)		FINISHED				UNFINISHED OR NOT COMPLETED		TOTAL COVERED BY CONTRACT OR ORDER  (g)
		PREVIOUSLY SHIPPED AND INVOICED  (b)	ON HAND		To Be Completed  (e)	Not To Be Completed  (f)		
			Payment To Be Received Through Invoicing (c)	Included in This Application (d)				
Fuze, P.D. M524A5, MPTS	QUANTITY						500,000	500,000
	\$						3,018,000	3,018,000
	QUANTITY							
	\$							
	QUANTITY							
	\$							

SECTION II.—APPLICANT'S OWN TERMINATION CHARGES  
(Exclusive of the Subcontractors' Charges)

SETTLEMENT PROPOSAL

☐ ATTACHED☒ PREVIOUSLY SUBMITTED

NO.	ITEM	CHARGES AS LISTED IN SETTLEMENT PROPOSAL
1	ACCEPTABLE FINISHED PRODUCT (at contract price)	
2	WORK IN PROCESS	
3	RAW MATERIALS, PURCHASED PARTS, AND SUPPLIES	
4	GENERAL AND ADMINISTRATIVE EXPENSE	
5	TOTAL (sum of lines 1, 2, 3, and 4)	
6	TOOLS, DIES, JIGS, FIXTURES, ETC.	
7	OTHER COSTS	
8	SETTLEMENT EXPENSES	
9	TOTAL (sum of lines 5, 6, 7, and 8)	
10	SUBCONTRACTOR SETTLEMENTS APPROVED BY CONTRACTING OFFICER OR SETTLED UNDER A DELEGATION OF AUTHORITY AND PAID BY APPLICANT	\$ 75,111.46

## AMOUNTS RECEIVED

a	UNPAID PARTIAL, PROGRESS, AND ADVANCE PAYMENTS RECEIVED	\$ 56,877.01
b	DISPOSAL AND OTHER CREDITS	
c	TOTAL (sum of lines a and b)	56,877.01
d	AMOUNT OF PARTIAL PAYMENT REQUESTED	18,234.45
e	TOTAL (sum of lines c and d)	\$ 75,111.46

DD FORM 548

REPLACES DD FORM 548, 1 APR 57, WHICH IS OBSOLETE

IN CONSIDERATION OF ANY PARTIAL PAYMENT WHICH MAY BE MADE, THE APPLICANT AGREES AS FOLLOWS:

(1) REPAYMENT OF EXCESS.—If any partial payment made to the contractor is in excess of the amount finally determined to be due on its termination claim, the excess shall be repaid to the Government upon demand, with interest at the rate of 6 percent per annum. Interest shall be computed for the period from the date of the excess payment to the date of repayment, except that (i) no interest shall be charged for any such excess payment attributable to a reduction in the contract termination claim by reason of retention or other disposition of termination inventory, until 10 days after the date of such retention or disposition, or such later date as determined by the contracting officer by reason of the circumstances, and (ii) no interest shall be charged for overpayment under cost-reimbursement type research and development contracts (*without profit or fee to*

*the contractor*) if the overpayments are repaid to the Government within 30 days after demand.

(2) PROMPT SETTLEMENT OF CLAIM.—The applicant will make every reasonable effort to expedite final settlement of the termination claim and the claims of its subcontractors, if any.

(3) DISPOSAL AND RETENTION OF INVENTORY.—Whenever the amount of any proceeds hereafter received by the applicant on the disposal of termination inventory, plus the cost or agreed value, as the case may be, of any termination inventory which the applicant hereafter elects to retain, exceeds the amount stated by the applicant in this application as the amount of his charges (*Section II, Line 9*) and the amount of such credits has not been included on *Section II, Line b (Disposal and Other Credits)*, the applicant within 10 days will notify the contracting agency of the amount of credits on account of such inventory disposal or retention.

SECTION IV.—CERTIFICATE OF APPLICANT

The undersigned certifies that the amount of his own charges (*exclusive of subcontractors' charges*) due as of the date of this application and allocable to the terminated portion of its contract Number DAAAC9-67-C-0039, dated 19 October 1966, with U. S. Army, is not less than \$ 151,010.00; that, to (From Sec. II, Line 9) the best of applicant's knowledge, the amounts received are as set forth above; and that the applicant has not assigned any moneys payable under this contract, except as set forth above.

NAME OF APPLICANT

AJAX HARDWARE CORPORATION

BY (Signature of authorized official)

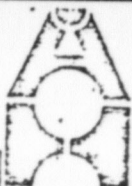
TITLE STIMLEY GOLDSHETH  
CONTROLLER

DATE

25 MARCH 1968

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES





# AJAX HARDWARE CORPORATION

825 SOUTH AJAX AVE., CITY OF INDUSTRY, CALIF. 91747

213- YORKTOWN 4-1261  
CUMBERLAND 3-7117

INVOICE NO.

10100-5

PLEASE PAY FROM THIS INVOICE

NOTE: PLEASE SEND ALL CANCELLATION CHARGES TO  
AJAX HARDWARE CORPORATION  
11099 SOUTH LA CiénEGA BOULEVARD  
LOS ANGELES, CALIFORNIA 90045  
CANCELLATION CHARGES PER OUR SETTLEMENT  
AGREEMENT WITH THE FOLLOWING SUB-CONTRACTOR:

TERMS

NET

STATE CUST. NO. TERM

SHIP TO :

DISBURSING OFFICER  
DEFENSE CONTRACT ADMINISTRATION  
SERVICES REGION  
11099 South La CiénEGA Boulevard  
Los Angeles, California 90045

ORDERED FROM

CUSTOMER ORDER NUMBER

DAAA09-67-C-0039

SHIP

DATE  
RECEIVED

ROUTING

ORDERED	SHIPPED	%	UNIT	STOCK NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
					CANCELLATION CHARGES PER OUR SETTLEMENT AGREEMENT WITH THE FOLLOWING SUB-CONTRACTOR:		18,234.45
					KADDIS MANUFACTURING CORP.	\$ 95.00	
					AYERS TOOL CO.	2,370.00	
					SCHAEVITZ ENGINEERING CORP.	14,197.00	
					KWIKSET POWDERED METAL PRODUCTS	1,478.30	
					REVERE COPPER AND BRASS	94.15	
						\$18,234.45	

*Subs*

*PD*

8% ADDITIONAL CHARGE FOR BROKEN CASES

NUMERICAL FILE

A-204

TOTAL AMOUNT

18,234.45

# EXHIBIT 7 TO EDWARD BRILL'S AFFIDAVIT

STATEMENT OF DEFENSE <b>APPLICATION OR PARTIAL PAYMENT</b>									
For use by Prime Contractor or Subcontractor under contracts terminated for the convenience of the Government									
THIS APPLICATION APPLIES TO (Check one) <input checked="" type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT <input type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER SUBCONTRACT OR PURCHASE ORDER NUMBER(S)					APPLICANT <b>AJAX HARDWARE CORPORATION</b> STREET ADDRESS <b>825 South Ajax Avenue</b> CITY AND STATE <b>City of Industry, California 91747</b>				
CONTRACTOR WHO SENT NOTICE OF TERMINATION NAME ADDRESS					NAME OF GOVERNMENT AGENCY <b>Dept. of the Army</b> <b>Ammunition Procurement and Supply Agency</b> GOVERNMENT PRIME CONTRACT NUMBER <b>DAAA09-67-C-0039</b> CONTRACTOR'S REFERENCE NUMBER <b>3500</b>				
IF CONTRACTOR HAS COMMITTED DAYS OR HAS ASSIGNED MONIES DUE UNDER THE CONTRACT, GIVE THE FOLLOWING: NAME AND ADDRESS OF FINANCING INSTITUTION NAME AND ADDRESS OF GUARANTOR NAME AND ADDRESS OF ASSIGNEE					EFFECTIVE DATE OF TERMINATION <b>Jan 3, 1967</b> AMOUNT REQUESTED <b>\$ 2,537.50</b>		DATE OF THIS APPLICATION <b>22 April 1968</b> APPLICATION NUMBER UNDER THIS TERMINATION <b>6</b>		
<b>SECTION I.—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION</b>									
PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER (a)				FINISHED		UNFINISHED OR NOT COMMENCED To Be Completed (e)      Not To Be Completed (f)		TOTAL COVERED BY CONTRACT OR ORDER (g)	
				PREVIOUSLY SHIPPED AND INVOICED (b)	ON HAND				
				Payment To Be Received Through Invoicing (c)	Included in This Application (d)				
<b>FUZE, P.D. M524A5, MPTS</b>				QUANTITY			500,000		500,000
				\$			3,018,000		3,018,000
				QUANTITY					
				\$					
				QUANTITY					
				\$					
<b>SECTION II.—APPLICANT'S OWN TERMINATION CHARGES</b> (Exclusive of his Subcontractors' Charges)									
								SETTLEMENT PROPOSAL <input type="checkbox"/> ATTACHED <input checked="" type="checkbox"/> PREVIOUSLY SUBMITTED	
NO.	ITEM							CHARGES AS LISTED IN SETTLEMENT PROPOSAL	
1	ACCEPTABLE FINISHED PRODUCT (at contract price)							\$	
2	WORK IN PROCESS							\$	
3	RAW MATERIALS, PURCHASED PARTS, AND SUPPLIES							\$	
4	GENERAL AND ADMINISTRATIVE EXPENSE							\$	
5	TOTAL (sum of lines 1, 2, 3, and 4)							\$	
6	TOOLS, DIES, JIGS, FIXTURES, ETC.							\$	
7	OTHER COSTS							\$	
8	SETTLEMENT EXPENSES							\$	
9	TOTAL (sum of lines 5, 6, 7, and 8)							\$ 151,010.00	
10	SUBCONTRACTOR SETTLEMENTS APPROVED BY CONTRACTING OFFICER OR SETTLED UNDER A DELEGATION OF AUTHORITY AND PAID BY APPLICANT							\$ 77,648.96	
<b>AMOUNTS RECEIVED</b>									
a	UNLIQUIDATED PARTIAL, PROGRESS, AND ADVANCE PAYMENTS RECEIVED							\$ 156,877.01	
b	DISPOSAL AND OTHER CREDITS							30.00	
c	TOTAL (sum of lines a and b)							156,907.01	
d	AMOUNT OF PARTIAL PAYMENT REQUESTED							2,537.50	
e	TOTAL (sum of lines c and d)							\$ 159,444.51	



### SECTION III.—AGREEMENT OF APPLICANT

IN CONSIDERATION OF ANY PARTIAL PAYMENT WHICH MAY BE MADE, THE APPLICANT AGREES AS FOLLOWS:

(1) REPAYMENT OF EXCESS.—If any partial payment made to the contractor is in excess of the amount finally determined to be due on its termination claim, the excess shall be repaid to the Government upon demand, with interest at the rate of 6 percent per annum. Interest shall be computed for the period from the date of the excess payment to the date of repayment, except that (i) no interest shall be charged for any such excess payment attributable to a reduction in the contract termination claim by reason of retention or other disposition of termination inventory, until 10 days after the date of such retention or disposition, or such later date as determined by the contracting officer by reason of the circumstances, and (ii) no interest shall be charged for overpayment under cost-reimbursement type research and development contracts (*without profit or fee to*

*the contractor*) if the overpayments are repaid to the Government within 30 days after demand.

(2) PROMPT SETTLEMENT OF CLAIM.—The applicant will make every reasonable effort to expedite final settlement of the termination claim and the claims of its subcontractors, if any.

(3) DISPOSAL AND RETENTION OF INVENTORY.—Whenever the amount of any proceeds hereafter received by the applicant on the disposal of termination inventory, plus the cost or agreed value, as the case may be, of any termination inventory which the applicant hereafter elects to retain, exceeds the amount stated by the applicant in this application as the amount of his charges (*Section II, Line 9*) and the amount of such credits has not been included on Section II, Line b (*Disposal and Other Credits*), the applicant within 10 days will notify the contracting agency of the amount of credits on account of such inventory disposal or retention.

### SECTION IV.—CERTIFICATE OF APPLICANT

The undersigned certifies that the amount of his own charges (*exclusive of subcontractors' charges*) due as of the date of this application and allocable to the terminated portion of its contract Number DAAA09-67-C-0039, dated 19 October 1966, with U. S. Army, is not less than \$ 151,010.00; that, to the best of applicant's knowledge, the amounts received are as set forth above; and that the applicant has not assigned any moneys payable under this contract, except as set forth above.

NAME OF APPLICANT

AJAX HARDWARE CORPORATION

BY (Signature of authorized official)

TITLE  
Stanley Goldsmith  
Controller

DATE

22 APR 1968

WHERE THE SPACE PROVIDED ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE REPORTING SCHEDULES



# AJAX HARDWARE CORPORATION

825 SOUTH AJAX AVE., CITY OF INDUSTRY, CALIF. 91747

213- YORKTOWN 4-1261  
CUMBERLAND 3-7117

INVOICE NO.

10100-6

SOLD TO :

SAME AS  
SHIPPED TO  
UNLESS  
SPECIFIED

Disbursing Officer  
Defense Contract Administration  
Services Region - Los Angeles  
11099 South La Cienega Blvd.  
Los Angeles, California 90045

PLEASE PAY FROM THIS INVOICE

NOTE. PLEASE SEND ALL REMITTANCES TO:  
AJAX HARDWARE CORPORATION  
54891 TERMINAL ANNEX  
LOS ANGELES, CALIF. 90054

ADDRESS PURCHASE ORDERS AND ALL  
OTHER CORRESPONDENCE TO US AT:  
825 SOUTH AJAX AVENUE,  
CITY OF INDUSTRY, CALIF. 91747

## TERMS

2% 10 E.O.M. NET 30 DAYS

F.O.B. OUR FACTORY.

PAYABLE IN AMERICAN FUNDS  
ON AN AMERICAN BANK.

STATE	CUST NO	TERM

SHIP TO :

TERMS ARE BASED ON THE DATE OF INVOICE  
NOT ON RECEIPT OF GOODS

ORDERED	FROM	CUSTOMER ORDER NUMBER	SHIP	DATE RECEIVED
		DAAA09-67-C-0039		

ROUTING

ORDERED	SHIPPED	% UNIT	STOCK NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
				Cancellation charges per our Settlement Agreement with the following Subcontractors:		2,537.50
				Chandler Leasing Corp. \$ 2,187.50		
				United Screw & Bolt Corp. 350.00		
				Total \$ 2,537.50		
				The payment covered by this Voucher is a partial payment on account of the Subcontractor's Termination Claim under Contract DAAA09-67-C-0039, made pursuant to Section VIII of The Armed Services Procurement Regulation		

5% ADDITIONAL CHARGE FOR BROKEN CASES

A-207

SALESMAN'S COPY

TOTAL AMOUNT

2,537.50



27 March 1968

EXHIBIT 8 TO EDWARD BRILL'S AFFIDAVIT

Defense Contract Administration Services Region  
Los Angeles  
11099 South La Cienega Blvd.  
Los Angeles, California 90045

Attention: DCRL-CT  
Salvatore J. DeSimone  
Termination Contracting Officer

Subject: Contract DAAAO9-67-C-0039

Gentlemen:

Reference our conversation of 26 March 1968, it is requested that the Termination Contracting Officer consider additional termination settlement expenses incurred in connection with the negotiations of subcontractor's claims, even though Mr. Louis agreed, in his Memorandum of Understanding dated 21 February 1968, that Ajax was not entitled to any further termination settlement expenses within its own organization in connection with the settlement of subcontractors' claims.

As you know, I have experienced considerable difficulty with some of the subcontractors in affecting acceptable settlement agreements.

Since 17 December 1967 through 27 March 1968, the following additional expenses have been incurred by Ajax personnel as indicated:

**Royce D. Zant**

62 hours @ \$5.05 per hour . . .	\$ 313.10	
69½ hrs @ \$5.78 per hour . . .	401.71	
Mileage expense		
1,084 miles @ 8¢ per mile . .	86.72	
Telephone expense . . . . .	25.00	
Postage expense . . . . .	15.00	
<b>Thelma Martin, Secretary</b>		
51 hours @ \$2.98 per hour . . .	151.98	\$ 993.51

**Projected Settlement Expenses for  
the remaining two Subcontractors  
(United Screw and Bolt, Chandler)**

10 hours @ \$5.78 . . . . .	57.80	
5 hours @ 2.98 . . . . .	14.90	72.70
<b>Subtotal</b> . . . . .		\$ 1,066.21
<b>G &amp; A</b> . . . . .		191.79
<b>Total</b> . . . . .		<u>\$ 1,258.00</u>

27 March 1968

DCASR - Los Angeles

Attn: DCRL-CT

Page Two

It is requested that you advise Ajax whether or not this additional termination settlement expense meets with your approval.

Sincerely yours,

Royce D. Zant  
Contract Administrator  
Devices and Systems Division

RDZ/tm

bcc: H. Louis  
Stanley Goldsmith





## DEFENSE SUPPLY AGENCY

DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, LOS ANGELES  
11099 SOUTH LA CIENEGA BOULEVARD  
LOS ANGELES, CALIFORNIA 90045

IN REPLY  
REFER TO DCRL-CT

12 July 1968

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ajax Hardware Corp.  
825 So. Ajax Ave.  
City of Industry, Calif. 91747

ATTN: Mr. Norman D. Louis, President

SUBJECT: Terminated Contract DAAA09-67-C-0039  
Terminated agreement with Time & Micro Instruments, Inc.

Gentlemen:

By letter of 10 July 1967, this office requested that you obtain a properly certified termination claim from your subcontractor, Time & Micro Instruments, Inc., that would be suitable for cost and technical evaluation by the Government.

Despite numerous written and telephonic requests your subcontractor declines to cooperate with you in this regard on the basis that his subcontract did not contain a Government subcontract termination clause. Section 8.209.2 of ASPR states that failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise his rights thereunder, shall not increase the obligation of the Government beyond that which would have arisen if the subcontract had contained an appropriate termination clause. If subject agreement had contained such a clause your subcontractor would have been required to present a properly certified claim within six months after effective date of termination. In order to be fair to all parties, I have extended this response time to over 18 months after effective date of termination. Because of circumstances surrounding this matter, it would be detrimental to the best interests of the Government not to enforce its rights under the contract to receive a total claim package within the one year period specified therein.

As you were advised during recent telephone conversations, I see no sound basis for reserving this unresolved issue in our settlement and must render a unilateral determination of the amount, if any, owed to Time & Micro Instruments, Inc. under subject terminated contract. Previous notice to render a unilateral determination was not enforced because of your subcontractor's continued promises to promptly submit an acceptable claim.

JUL 15 1968

DCRL-CT

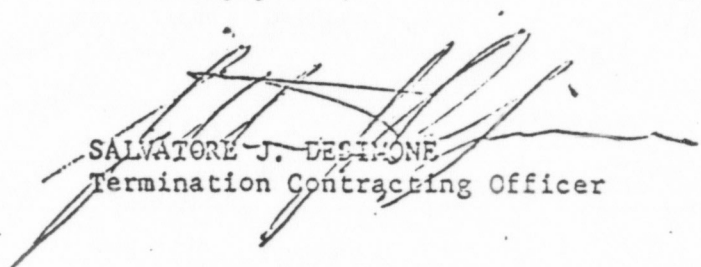
12 July 1968

SUBJECT: Terminated Contract DAAA09-67-C-0039  
Terminated agreement with Time & Micro Instruments, Inc.

In accordance with Section 8-210.7(b) of the Armed Services Procurement Regulations, a 15-day final notice is hereby given to furnish this office on or before 30 July 1968 any written evidence substantiating the amount claimed to be due subject subcontractor that will aid the Termination Contracting Officer in making a fair determination.

Our proposed negotiated settlement of your own Settlement Proposal in the amount of \$152,268 plus approved subcontractor settlements will be presented to the local Settlement Review Board promptly upon my determination, or resolution, of subject outstanding subcontractor matter on 31 July 1968.

Sincerely yours,



SALVATORE J. DESIMONE  
Termination Contracting Officer

Copy to:  
Time & Micro Instruments, Inc.

Jack Paul, Special Counsel



## EXHIBIT 10A TO EDWARD BRILL'S AFFIDAVIT

DEPARTMENT OF DEFENSE  
SETTLEMENT PROPOSAL (Total Cost Basis)Form approved.  
Budget Bureau No. 22-11073.

FOR USE BY A FIXED-PRICE PRIME CONTRACTOR OR FIXED-PRICE SUBCONTRACTOR

THIS PROPOSAL APPLIES TO (Check one) <input type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT <input checked="" type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER		COMPANY Time & Micro Instruments, Inc.	
SUBCONTRACT OR PURCHASE ORDER NO(S). TWX		STREET ADDRESS 1414 Avenue of the Americas	
CONTRACTOR WHO SENT NOTICE OF TERMINATION		CITY AND STATE New York, New York 10019	
NAME Ajax Hardware Manufacturing Corporation		NAME OF GOVERNMENT AGENCY APSA, Joliet	
ADDRESS City of Industry, California 91747		GOVERNMENT PRIME CONTRACT NO. DAAG09-67-C-0039	CONTRACTOR'S REFERENCE NO.
IF MONEYS PAYABLE UNDER THE CONTRACT HAVE BEEN ASSIGNED, GIVE THE FOLLOWING		EFFECTIVE DATE OF TERMINATION 30 December 1968	
NAME OF ASSIGNEE Ajax Hardware Manufacturing Corporation		PROPOSAL NO.	
ADDRESS City of Industry, California 91747		CHECK ONE <input type="checkbox"/> INTERIM <input checked="" type="checkbox"/> FINAL	
DD FORM 545 (Schedule of accounting information) <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT ATTACHED. (If not, explain)			

## SECTION I—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION

PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER		FINISHED			UNFINISHED OR NOT COMMENCED		TOTAL COVERED BY CONTRACT OR ORDER
		PREVIOUSLY SHIPPED AND INVOICED	ON HAND		SUBSEQUENTLY COMPLETED AND INVOICED <sup>1</sup>	NOT TO BE COMPLETED	
			PAYMENT TO BE RECEIVED THROUGH INVOICING	PAYMENT NOT TO BE RECEIVED THROUGH INVOICING			
(a)		(b)	(c)	(d)	(e)	(f)	(g)
Setback & Timing Devices	Quantity						250,000
	\$						\$ 317,500
	Quantity						
	\$						
	Quantity						
	\$						

## SECTION II—PROPOSED SETTLEMENT

NO.	ITEM (a)	(Use Columns (b) and (c) Only Where Previous Proposal Has Been Filed)		TOTAL PROPOSED TO DATE (d)	FOR USE OF CONTRACTING AGENCY ONLY (e)
		TOTAL PREVIOUSLY PROPOSED (b)	INCREASE OR DECREASE BY THIS PROPOSAL (c)		
1	DIRECT MATERIAL				
2	DIRECT LABOR				
3	INDIRECT FACTORY EXPENSE (from Schedule A)			25,109.94	
4	DIES, JIGS, FIXTURES AND SPECIAL TOOLS (DD Form 545)				
5	OTHER COSTS (from Schedule B)			4,966.30	
6	GENERAL AND ADMINISTRATIVE EXPENSES (from Schedule C)			20,594.27	
7	TOTAL COSTS (Items 1 thru 6)			50,670.51	
8	PROFIT (explain in Schedule D)			7,500.00	
9	TOTAL (Items 7 and 8)			58,170.51	
10	DEDUCT—FINISHED PRODUCT INVOICED OR TO BE INVOICED <sup>1</sup>			-	
11	TOTAL (Item 9 less Item 10)			58,170.51	
12	SETTLEMENT EXPENSES (from Schedule E)			12,000.00	
13	TOTAL (Items 11 and 12)			70,170.51	
14	SETTLEMENTS WITH SUBCONTRACTORS (from Schedule F)			-	
15	GROSS PROPOSED SETTLEMENT (Items 13 thru 14)			70,170.51	
16	DISPOSAL AND OTHER CREDITS			-	
17	NET PROPOSED SETTLEMENT (Item 15 less 16)			70,170.51	
18	ADVANCE, PROGRESS AND PARTIAL PAYMENTS (from Schedule H)			5,000.00	
19	NET PAYMENT REQUESTED (Item 18 less 19)			65,170.51	

<sup>1</sup>Column (e), Section I, should only be used in the event of a partial termination, in which case the total cost reported in Section II should be accumulated to date of completion of the continued portion of the contract and the deduction for finished product (Item 10, Section II) should be the contract price of finished product in Columns (b), (c) and (e), Section I.

NOTE.—Inventory schedules (DD Forms 542, 543, 544, and 545) applicable to inventories allocable to this contract and on hand at date of termination must be filed. See Instructions.

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

DD FORM 541  
1 APR 57

A-212

REPLACES DD FORM 541, 1 MAR 54, WHICH IS OBSOLETE

**SCHEDULE A—INDIRECT FACTORY EXPENSE (Item 4)**

DETAIL OF EXPENSES	METHOD OF ALLOCATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Salaries			
J. Shriro (Comp and b/d due)		13,000.00	
K. Muller		3,000.00	
Erisman		2,990.00	
Kaplan		280.00	
Hilt		2,537.50	
Harsh		942.50	
Johns		2,161.25	
Payroll Expense		198.69	

**SCHEDULE B—OTHER COSTS (Item 5)**

ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Factory Expenses	Expenses incident to preparation for production, planning, scheduling, machinery readiness, etc.		
Rent		1,120.00	
Electricity		1,700.42	
Factory Telephone		171.48	
Fuel		820.05	
Real Estate Tax		537.35	
Water		54.00	
Storage of Machinery		133.00	
Fire Insurance-Building		130.00	
Petty Cash		300.00	

**SCHEDULE C—GENERAL AND ADMINISTRATIVE EXPENSES (Item 6)**

DETAIL OF EXPENSES	METHOD OF ALLOCATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Legal		6,500.00	
Accounting		650.00	
Interest		3,296.50	
Travel		2,742.75	
Auto		2,204.12	
NYC Telephone		1,089.14	
NYC Office		3,900.00	
Bank Charges		65.62	
Stationery & Printing		146.14	

**SCHEDULE D—PROFIT (Item 8)**

EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Fair and reasonable profit on termination of contract of over \$ 300,000.00 at approximately 15% of costs expended.	7,500.00	

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES



**SCHEDULE L—SETTLEMENT EXPENSES (Item 1)**

ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Salaries & Expenses for three months (estimated)	Closeout operations, forced sale of equipment, dismantling of facilities.	12,000.00	

**SCHEDULE F—SETTLEMENTS WITH IMMEDIATE SUBCONTRACTORS AND SUPPLIERS (Item 14)**

NAME AND ADDRESS OF SUBCONTRACTOR	BRIEF DESCRIPTION OF PRODUCT CANCELED	AMOUNT OF SETTLEMENT	FOR USE OF CONTRACTING AGENCY ONLY
None			

**SCHEDULE G—DISPOSAL AND OTHER CREDITS (Item 16)**

DESCRIPTION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
None		

(If practicable, show separately amount of disposal credits applicable to acceptable finished product reported on DD Form 543)  
**NOTE.**—Individual items of small amounts may be grouped into a single entry in Schedules A, B, C, D, E, and G.

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

SCHEDULE H- ADVANCE, PROGRESS AND PAYMENT PAYMENTS

DATE	TYPE OF PAYMENT	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
December 1966	Advance	\$ 5,000.00	

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

**CERTIFICATE**

THE UNDERSIGNED, individually and as an authorized representative of the contractor, certifies that he has examined this settlement proposal and that, to the best of his knowledge and belief:

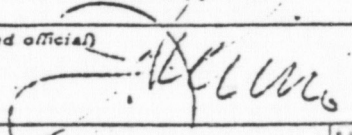
(1) AS TO CONTRACTOR'S OWN CHARGES.—The proposed settlement (*exclusive of charges set forth in Item 14*) and supporting schedules and explanations have been prepared from the books of account and records of the contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States or an agency thereof; and the charges as stated are fair and reasonable.

(2) AS TO SUBCONTRACTORS' CHARGES.—(a) The contractor has examined, or caused to be examined, to an extent it considered adequate in the circumstances, the claims of its immediate subcontractors (*exclusive of claims filed against such immediate subcontractors by their subcontractors*); (b) The settlements on account of immediate subcontractors' own charges are fair and reasonable, said charges are allocable to the terminated portion of this contract and said settlements were negotiated in good faith and are not more favorable to its immediate subcontractors than those which the contractor would make if reimbursement by the Government were not involved; (c) the contractor has received from all its immediate subcontractors appropriate certificates with respect to their claims, which certificates are substantially in the form of this certificate; and (d) the contractor has no information leading it to doubt (i) the reasonableness of the settlements with more remote subcontractors or (ii) that the charges for them are allocable to this contract. Upon receipt by the contractor of amounts covering settlements with its immediate subcontractors, the contractor will pay or credit them promptly with the amounts so received, to the extent that it has not previously done so. The term "subcontractor" as used above includes suppliers.

NAME OF CONTRACTOR

Time & Micro Instruments, Inc.  
1414 Avenue of the Americas  
New York, New York, 10019;

BY (Signature of authorized official)



TITLE

J. Shriro - President

DATE

Dec. 9, 1968

NAME OF SUPERVISORY ACCOUNTING OFFICIAL

TITLE



## EXHIBIT 10B TO EDWARD BRILL'S AFRIDAVIT

DEPARTMENT OF DEFENSE <b>SETTLEMENT PROPOSAL (Total Cost Basis)</b>		Form approved, Budget Bureau No. 22-14073.	
FOR USE BY A FIXED-PRICE PRIME CONTRACTOR OR FIXED-PRICE SUBCONTRACTOR			
THIS PROPOSAL APPLIES TO (Check one) <input type="checkbox"/> A PRIME CONTRACT WITH THE GOVERNMENT <input checked="" type="checkbox"/> SUBCONTRACT OR PURCHASE ORDER		COMPANY Time & Micro Instruments, Inc.	
SUBCONTRACT OR PURCHASE ORDER NO(S). TWX		STREET ADDRESS 1414 Avenue of the Americas	
CONTRACTOR WHO SENT NOTICE OF TERMINATION NAME Ajax Hardware Manufacturing Corporation		CITY AND STATE New York, New York 10019	
ADDRESS City of Industry, California 91747		NAME OF GOVERNMENT AGENCY APSA, Joliet	
IF MONEYS PAYABLE UNDER THE CONTRACT HAVE BEEN ASSIGNED, GIVE THE FOLLOWING NAME OF ASSIGNEE Ajax Hardware Manufacturing Corporation		GOVERNMENT PRIME CONTRACT NO. DAAG09-67-C-0039	CONTRACTOR'S REFERENCE NO.
ADDRESS City of Industry, California 91747		EFFECTIVE DATE OF TERMINATION 30 December 1968	
		PROPOSAL NO.	CHECK ONE <input type="checkbox"/> INTERIM <input checked="" type="checkbox"/> FINAL
DO FORM 546 (Schedule of accounting information) <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT ATTACHED. (If not, explain)			

## SECTION I—STATUS OF CONTRACT OR ORDER AT EFFECTIVE DATE OF TERMINATION

PRODUCTS COVERED BY TERMINATED CONTRACT OR PURCHASE ORDER		FINISHED			UNFINISHED OR NOT COMMENCED		TOTAL COVERED BY CONTRACT BY CONTRACT OR ORDER
		PREVIOUSLY SHIPPED AND INVOICED	ON HAND		SUBSEQUENTLY COMPLETED AND INVOICED <sup>1</sup>	NOT TO BE COMPLETED	
			PAYMENT TO BE RECEIVED THROUGH INVOICING	PAYMENT NOT TO BE RECEIVED THROUGH INVOICING			
(a)		(b)	(c)	(d)	(e)	(f)	(g)
Setback & Timing Devices	Quantity						
	\$						250,000
	Quantity						\$317,500
	\$						
	Quantity						
	\$						

## SECTION II—PROPOSED SETTLEMENT

NO.	ITEM  (a)	(Use Columns (b) and (c) Only Where Previous Proposal Has Been Filed)		TOTAL PROPOSED TO DATE (d)	FOR USE OF CONTRACTING AGENCY ONLY (e)
		TOTAL PREVIOUSLY PROPOSED (b)	INCREASE OR DECREASE BY THIS PROPOSAL (c)		
1	DIRECT MATERIAL				
2	DIRECT LABOR				
3	INDIRECT FACTORY EXPENSE (from Schedule A)	25,109.94	(12,555.00)	12,554.94	
4	DIES, JIGS, FIXTURES AND SPECIAL TOOLS (DD Form 545)				
5	OTHER COSTS (from Schedule B)	4,966.30	( 2,483.15)	2,483.15	
6	GENERAL AND ADMINISTRATIVE EXPENSES (from Schedule C)	20,594.27	( 9,796.50)	10,797.77	
7	TOTAL COSTS (Items 1 thru 6)	50,670.51	(24,834.65)	25,835.86	
8	PROFIT (explain in Schedule D)	7,500.00	( 2,500.00)	5,000.00	
9	TOTAL (Items 7 and 8)	58,170.51	(27,334.65)	30,835.86	
10	DEDUCT: FINISHED PRODUCT INVOICED OR TO BE INVOICED <sup>1</sup>	-	-	-	
11	TOTAL (Item 9 less Item 10)	58,170.51	(27,334.65)	30,835.86	
12	SETTLEMENT EXPENSES (from Schedule E)	12,000.00	( 7,815.00)	4,185.00	
13	TOTAL (Items 11 and 12)	70,170.51	(35,149.65)	35,020.86	
14	SETTLEMENTS WITH SUBCONTRACTORS (from Schedule F)	-	-	-	
15	GROSS PROPOSED SETTLEMENT (Items 13 thru 14)	70,170.51	(35,149.65)	35,020.86	
16	DISPOSAL AND OTHER CREDITS	-	-	-	
17	NET PROPOSED SETTLEMENT (Item 15 less 16)	70,170.51	(35,149.65)	35,020.86	
18	ADVANCE, PROGRESS AND PARTIAL PAYMENTS (from Schedule H)	( 5,000.00)	-0-	( 5,000.00)	
19	NET PAYMENT REQUESTED (Item 17 less 18)	65,170.51		30,020.86	

<sup>1</sup> Column (e), Section I, should only be used in the event of a partial termination, in which case the total cost reported in Section II should be accumulated to date of completion of the continued portion of the contract and the deduction for finished product (Item 10, Section II) should be the contract price of finished product in Columns (b), (c) and (e), Section I.

NOTE.—Inventory schedules (DD Forms 542, 543, 544, and 545) applicable to inventories allocable to this contract and on hand at date of termination must be filed. See instructions.

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

**SCHEDULE A—INDIRECT FACTORY EXPENSE (Item 2)**

DETAIL OF EXPENSES	METHOD OF ALLOCATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Salaries Decrease by allowing salaries only for total pre-contract & contract time of 3 months	Pro-rata 3/6 <u>ths</u>	(12,555.00)	

**SCHEDULE B—OTHER COSTS (Item 3)**

ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Factory Expenses Decrease by allowing only 3 months	Pro-rata 3/6 <u>ths</u>	( 2,483.15)	

**SCHEDULE C—GENERAL AND ADMINISTRATIVE EXPENSES (Item 4)**

DETAIL OF EXPENSES	METHOD OF ALLOCATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Delete: Interest and legal expenses		( 9,796.50)	

**SCHEDULE D—PROFIT (Item 5)**

EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Reduce profit to 10% of original estimated costs	( 2,500.00)	

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES



**SCHEDULE E—SETTLEMENT EXPENSES (Item 12)**

ITEM	EXPLANATION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
Allow salaries of Indirect personnel for one month only	Decrease to salaries for one month only 1/6 of original Item 3.  \$ 12,000 less \$ 4,185 = decreased amount	(7,815.00)	

**SCHEDULE F—SETTLEMENTS WITH IMMEDIATE SUBCONTRACTORS AND SUPPLIERS (Item 14)**

NAME AND ADDRESS OF SUBCONTRACTOR	BRIEF DESCRIPTION OF PRODUCT CANCELED	AMOUNT OF SETTLEMENT	FOR USE OF CONTRACTING AGENCY ONLY

**SCHEDULE G—DISPOSAL AND OTHER CREDITS (Item 16)**

DESCRIPTION	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY

(If practicable, show separately amount of disposal credits applicable to acceptable finished product reported on DD Form 143)

**NOTE.**—Individual items of small amounts may be grouped into a single entry in Schedules A, B, C, D, E, and G.

WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

SCHEDULE H- ADVANCE, PROGRESS AND PARTIAL PAYMENTS

DATE	TYPE OF PAYMENT	AMOUNT	FOR USE OF CONTRACTING AGENCY ONLY
December 1966	Advance	5,000.00	

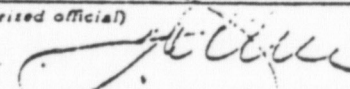
WHERE THE SPACE PROVIDED FOR ANY INFORMATION IS INSUFFICIENT, ATTACH SEPARATE SUPPORTING SCHEDULES

**CERTIFICATE**

THE UNDERSIGNED, individually and as an authorized representative of the contractor, certifies that he has examined this settlement proposal and that, to the best of his knowledge and belief:

(1) AS TO CONTRACTOR'S OWN CHARGES.—The proposed settlement (*exclusive of charges set forth in Item 14*) and supporting schedules and explanations have been prepared from the books of account and records of the contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States or an agency thereof; and the charges as stated are fair and reasonable.

— (2) AS TO SUBCONTRACTORS' CHARGES.—(a) The contractor has examined, or caused to be examined, to an extent it considered adequate in the circumstances, the claims of its immediate subcontractors (*exclusive of claims filed against such immediate subcontractors by their subcontractors*); (b) The settlements on account of immediate subcontractors' own charges are fair and reasonable, said charges are allocable to the terminated portion of this contract and said settlements were negotiated in good faith and are not more favorable to its immediate subcontractors than those which the contractor would make if reimbursement by the Government were not involved; (c) the contractor has received from all its immediate subcontractors appropriate certificates with respect to their claims, which certificates are substantially in the form of this certificate; and (d) the contractor has no information leading it to doubt (i) the reasonableness of the settlements with more remote subcontractors or (ii) that the charges for them are allocable to this contract. Upon receipt by the contractor of amounts covering settlements with its immediate subcontractors, the contractor will pay or credit them promptly with the amounts so received, to the extent that it has not previously done so. The term "subcontractor" as used above includes suppliers.

NAME OF CONTRACTOR Time & Micro Instruments, Inc. 1414 Avenue of the Americas New York, New York 10019		BY (Signature of authorized official) 	
		TITLE J. Shriro - President	DATE Jan. 30, 1969
NAME OF SUPERVISORY ACCOUNTING OFFICIAL		TITLE	



DEFENSE SUPPLY AGENCY

DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, LOS ANGELES  
11099 SOUTH LA CIENEGA BOULEVARD  
LOS ANGELES, CALIFORNIA 90045



ONLY  
REFERTO

DCRL-CT

10 March 1969

Ajax Hardware Mfg Corp.  
825 South Ajax Avenue  
City of Industry, Calif. 91747  
Attn: S. Gottlieb, Contract Manager

SUBJECT: Terminated Agreement with Time and Micro Instruments, Inc.,  
under Terminated Contract DAAA09-67-C-0039

Gentlemen:

The proposed settlement with your subcontractor under terminated Agreement, dated 13 December 1966, which you certified is proper and reasonable for payment under subject terminated contract has been reviewed and is hereby approved in the net proposed amount of \$20,000.00.

Please furnish the undersigned with a copy of a Settlement Agreement or proper release, similar to the enclosed agreement format, executed by your subcontractor that will evidence settlement of this terminated subcontract.

Sincerely,

  
SALVATORE J. DESIMONE

Termination Contracting Officer

Encl



EXHIBIT 12 TO EDWARD BRILL'S AFFIDAVIT  
DEFENSE SUPPLY AGENCY

DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, LOS ANGELES,  
11099 SOUTH LA CIENEGA BOULEVARD  
LOS ANGELES, CALIFORNIA 90045

*File*  
*7-1-69*  
*Intelligence*  
*[Signature]*

DCRL-CT

24 Mar 1969

Ajax Hardware Corporation  
825 So. Ajax Avenue  
City of Industry, CA 91747

Gentlemen:

Enclosed is a copy of S. A. No. A001, to Contract No. DAAA09-67-C-0039, Docket No. S0506AA7075 which covers our recent termination settlement of subject contract.

Also enclosed are four signature pages to be signed as indicated. The signature of one officer of the company is required. Please have all titles and names typed on the agreement. Upon return of these enclosures, they will be signed by the Termination Contracting Officer and appropriate distribution made. An executed copy will be returned for your files.

Also, please return seven (7) copies of your invoice in the amount of \$72,258.04 with the following certification:

CERTIFICATION

"I certify that the above bill is correct and just  
and that payment therefore has not been received."

(Sign and date)

Upon receipt of the above documents, they will be processed and transmitted to the Disbursing Officer for payment,

Sincerely,

*[Signature]*  
SALVATORE J. DESIMONE  
Termination Contracting Officer

Encls  
a/n

DCRL-C FL 75. 2 Aug 67, (Rev)





# AJAX HARDWARE CORPORATION

825 SOUTH AJAX AVE., CITY OF INDUSTRY, CALIF. 91747  
A. C. 213, YORKTOWN 4 - 1261 • TELEX 67 0450 • DUNS 00 025 5010

SOLD  
TO

DISBURSING OFFICER  
DEFENSE CONTRACT ADMINISTRATION  
SERVICE REGION  
11099 South La Cienega Boulevard  
Los Angeles, California 90045

PLEASE REFER  
TO OUR  
INVOICE NO:

10100-6

INVOICE DATE		
3	24	69

PLEASE PAY FROM THIS INVOICE

TERMS NET

XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXX

STATE	CUST #	DATE

PLEASE SEND ALL REMITTANCES TO:  
AJAX HARDWARE CORPORATION  
891 TERMINAL ANNEX  
LOS ANGELES, CALIF. 90054

ADDRESS PURCHASE ORDERS AND ALL  
OTHER CORRESPONDENCE TO US AT:  
825 SOUTH AJAX AVENUE,  
CITY OF INDUSTRY, CALIF. 91747

NO. 10100-6
-------------

CUSTOMER ORDER NO. DAAA09-67-C-0039		ROUTING		SHIP		DATE SHIPPED		DATE RECEIVED	
BACK ORDERED	SHIPPED	B/C	UNIT	STOCK NO. / DESCRIPTION		WEIGHT	CTN. NO	UNIT PRICE	AMOUNT
				Final invoice for balance in settlement of Terminated Contract DAAA09-67-C-0039.					\$72,258.04
I hereby certify that the above is due and correct, and that payment therefor has not been received.									
AJAX HARDWARE CORPORATION									
By <u>Stanley Goldsmith</u> Stanley Goldsmith Controller									

A-222

TOTAL ➡

\$72,258.04

ORIGINAL

10% ADDITIONAL CHARGE FOR BROKEN CASES

GENERAL SERVICES ADMINISTRATION PROC. REG. 141 CPM 1-16-101		AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		PAGE 1	OF 4
1. SOLICITATION/MODIFICATION NO. <b>4001</b>		2. EFFECTIVE DATE <b>69 Mar 26</b>		3. REQUISITION/PURCHASE REQUEST NO. <b>DKE 000004A7075</b>	
4. PROJECT NO. (If applicable)		5. ADMINISTERED BY (If other than block 5)		6. CODE	
7. CONTRACTOR NAME AND ADDRESS <b>BCASR-IA BCRL-CT 11099 So. LaCienega Blvd. Los Angeles, California 90045</b>		8. FACILITY CODE		9. AMENDMENT OF SOLICITATION NO.	
10. MODIFICATION OF CONTRACT/ORDER NO. <b>DAAG-09-67-C-0039</b>		11. DATED <b>65 Oct 19</b> (See block 11)		12. DATED <b>65 Oct 19</b> (See block 11)	
<p>9. THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS</p> <p><input type="checkbox"/> The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers <input type="checkbox"/> is extended, <input type="checkbox"/> is not extended.</p> <p>Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods:</p> <p>(a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.</p>					
<p>10. ACCOUNTING AND INFORMATION DATA (If required)</p> <p><b>21X2030 605-0251 P-4310 S11173</b></p> <p><b>21X2030 705-0251 P-4310 S11173</b></p>					
<p>11. THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS</p> <p>(a) <input type="checkbox"/> This Change Order is issued pursuant to _____</p> <p>The Changes set forth in block 12 are made to the above numbered contract/order.</p> <p>(b) <input type="checkbox"/> The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in block 12.</p> <p>(c) <input checked="" type="checkbox"/> This Supplemental Agreement is entered into pursuant to authority of <b>DA</b></p> <p>It modifies the above numbered contract as set forth in block 12.</p>					
<p>12. DESCRIPTION OF AMENDMENT/MODIFICATION</p> <p>WHEREAS, the Contractor and the Government have entered into Contract No. <b>DAAG-09-67-C-0039</b> under date of <b>65 Oct 19</b> which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and</p> <p>WHEREAS, the Termination for Convenience of the Government clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government, and that the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and</p> <p>WHEREAS, by notice of termination dated <b>66 Dec 30</b> the Government advised the Contractor of the complete termination of the contract for the convenience of the Government; and</p> <p>WHEREAS, as used herein the following terms shall have the meanings hereinafter set forth:</p> <p>Except as provided herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect.</p>					
<p><input type="checkbox"/> CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT</p> <p><input checked="" type="checkbox"/> CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN <b>6</b> COPIES TO ISSUING OFFICE</p>					
13. NAME OF CONTRACTOR/OFFEROR <b>Executive Vice President</b>		14. DATE SIGNED <b>23 MAR 1969</b>		15. UNITED STATES OF AMERICA <b>Termination Contracting Officer</b>	
16. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)		17. DATE SIGNED		18. DATE SIGNED	



The term "termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the contract which are properly allocable to the terminated portion of the contract, but shall not include any facilities, materials, production or other equipment, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include Government-furnished property and contractor-acquired property as defined below.

- (i) Government-furnished property is property in the possession of or acquired directly by the Government, and delivered or otherwise made available to the Contractor.
- (ii) Contractor-acquired property is property procured or otherwise provided by the Contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

The term "subcontract" means any contract as defined in ASPR 1-201.4 other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

The term "scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

NOW, THEREFORE, the parties hereto do mutually agree as follows:

ARTICLE 1. The Contractor certifies that all contract termination inventory (including scrap) has been retained or otherwise acquired by him, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, otherwise properly accounted for, and all proceeds or retention prices thereof, if any, have been taken into account in arriving at this agreement.

ARTICLE 2. a. The Contractor certifies that, prior to the execution of this agreement, each of the Contractor's immediate subcontractors whose claim is included in the claim settled by this agreement has furnished to the Contractor a certificate stating (i) that all of his subcontract termination inventory (including scrap) has been retained or otherwise acquired by him, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, were taken into account in arriving at the settlement of the subcontract or subcontracts, and (ii) that the subcontractor has received from each of the immediate subcontractors whose claim was included in his claim a substantially similar certificate.

(Page 2 of Termination Supplemental Agreement No. A001 to  
Contract DAAA09-67-C-0039, Dkt: 80306AA7073

FP-C

b. The Contractor hereby transfers and conveys to the Government all the right, title, and interest, if any, which the Contractor has received, or is entitled to receive, in and to subcontract termination inventory, if any, not otherwise properly accounted for and hereby assigns to the Government any and all of his rights relating thereto.

ARTICLE 3. The Contractor certifies that, with respect to all items of termination inventory the costs of which were taken into account in arriving at the amount of this settlement, or in the settlement of any subcontract claim included in this settlement: (i) all such items are properly allocable to the terminated portion of the contract; (ii) such items are not in excess of the reasonable quantitative requirements of the terminated portion of the contract; (iii) such items do not include any items reasonably usable without loss to the Contractor, on his other work; and (iv) the Contractor has informed the Contracting Officer of any substantial change in the status of such items between the dates of his termination inventory schedules and the date of this agreement.

ARTICLE 4. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

ARTICLE 5. a. The Contractor has received the sum of \$ 0 on account of work and services performed, or articles delivered, under the completed portion of the contract. The Government as part of this negotiated settlement hereby confirms and acknowledges the right of the Contractor, subject to the provisions of Article 6 hereof, to retain such sum heretofore paid and agrees that such sum constitutes a portion of the total amount to which the Contractor is entitled in settlement of the Contract.

b. In addition, upon execution of this agreement the Government agrees to pay to the Contractor or his assignee, upon presentation of properly certified invoices or vouchers, the sum of \$ 72,258.04 arrived at by deducting from the sum of \$ 249,917.00 (1) the amount of \$ 177,643.96 representing all unliquidated partial or progress payments previously made on account to the Contractor or his assignee and all unliquidated advance payments (with interest, if any, thereon), (2) the amount of \$ 10.00 representing all applicable property disposal credits, and (3) the amount of \$ 0 representing all other amounts due the Government under this contract except as hereinafter provided in Article 6. Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor by reason of the complete termination of work under the contract and of all other claims and liabilities of the Contractor and the Government under the contract, except as hereinafter provided in Article 6.

(Page 3 of Termination Supplemental Agreement No. A001 to  
Contract DAAU9-67-C-0039, Dkt 50506AAJ073

FP-C



ARTICLE 6. Notwithstanding any other provision of this agreement, the following rights and liabilities of the parties under the contract are hereby reserved:

(1) All rights and liabilities, if any, of the parties under the Renegotiation Act of 1951.

(2) All rights and liabilities of the parties arising under the contract articles, if any, or otherwise which relate to reproduction rights, patent infringements, inventions, applications for patent and patents, including rights to assignments invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(3) All rights of the Government to take the benefit of any adjustments of Royalties under the Royalty Adjustment Act of 1942 (35 U.S.C. 89-96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with the performance of the contract.

(4) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, covenants of indemnity.

(5) All rights and liabilities of the parties arising under the contract, or otherwise, concerning defects in, or guaranties or warranties relating to, any articles or component parts furnished to the Government by the Contractor pursuant to the contract or this agreement.

(6) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, "officials not to benefit."

IN WITNESS WHEREOF, the parties hereto have executed this agreement on Page No. 1 hereof as of the effective date stated thereon.

(Page 4 of Termination Supplemental Agreement No. **AD01 to**  
**Contract DAAA09-67-C-0039, Dkt S0506AA7075**)

FP-C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

: 69 Civil 1900 (RHL)

Plaintiff,

: NOTICE OF INTENTION TO AMEND  
: DEFENDANT'S ANSWER

-against-

INDUSTRIAL PLANTS CORPORATION,

:

Defendant.

:

-----X

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 15 of the Federal Rules of Civil Procedure the undersigned will move this Court at the opening of the trial of this action for leave to add as an affirmative defense the following:

"AS AND FOR AN AFFIRMATIVE DEFENSE  
TO THE FIRST COUNT (BREACH OF CONTRACT)

Plaintiff, by its conscious acceptance of and payment for the appraisal prepared by the defendant pursuant to its oral engagement by the plaintiff, has waived any right to claim that the variances therein from the kind of appraisal which plaintiff had requested constitute a breach of agreement for which the



plaintiff was entitled to recover damages."

Dated: New York, N. Y.  
September 22, 1975

Yours, etc.

MONASCH CHASEN & STREAM

By 

Arnold C. Stream, a member thereof  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1880

TO: POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

: 69 Civil 1900 (RHL)

Plaintiff,

: REQUESTS FOR ADMISSIONS

-against-

INDUSTRIAL PLANTS CORPORATION, :

Defendant.

-----X

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 36, Federal Rules of Civil Procedure, you are requested to admit for purposes of the pending action only the genuineness of the following documents, copies of which are appended to plaintiff's motion for a protective order dated September 23, 1975 and served upon the undersigned on the same date:

1. Plaintiff's claim (Form DD540) to the Department of Army, Ammunition Procurement & Supply Agency (herein called "the U. S. Army"), attached thereto as Exhibit 2.
2. Plaintiff's application (Form DD548) dated January 24, 1968 to the U. S. Army for partial payment, attached thereto as Exhibit 3.



3. Memorandum of understanding dated February 21, 1968, attached thereto as Exhibit 4.
4. Plaintiff's application (Form DD548) dated February 23, 1968 to the U. S. Army for partial payment and plaintiff's invoice No. 10100-3, both attached thereto as Exhibit 5.
5. Plaintiff's application (Form DD548) dated March 25, 1968 to the U. S. Army for partial payment and plaintiff's invoice No. 10100-5, both attached thereto as Exhibit 6.
6. Plaintiff's application (Form DD548) dated April 22, 1968 to the U. S. Army for partial payment and plaintiff's invoice No. 10100-6, both attached thereto as Exhibit 7.
7. Plaintiff's letter dated March 27, 1968 to the U. S. Army, attached thereto as Exhibit 8.
8. Letter dated July 12, 1968 from Salvatore J. Desimone, Termination Contracting Officer, Defense Supply Agency, to plaintiff, attached thereto as Exhibit 9.
9. Settlement proposal (Form DD541) of Time & Micro Instruments, Inc. dated December 9, 1968 to the U. S. Army, attached thereto as Exhibit 10A.
10. Settlement proposal (Form DD541) of Time & Micro Instruments, Inc. dated January 30, 1969 to the U. S. Army, attached thereto as Exhibit 10B.
11. Letter dated March 10, 1969 from Salvatore J. Desimone, Termination Contracting Officer, Defense Supply Agency, to plaintiff, attached thereto as Exhibit 11.
12. Letter dated March 24, 1969 from Salvatore J. Desimone, Termination Contracting Officer, Defense Supply Agency, to plaintiff, together with plaintiff's invoice No. 10100-6 and

HARRY R. GOWERTZ

Termination Supplemental Agreement No. A001 (Standard Form 30, July, 1966, four pages) dated March 25, 1969 between plaintiff, over the signature of ~~James E. Klein~~, Executive Vice President, and the United States of America over the signature of Salvatore J. Desimone, attached thereto as Exhibit 12.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 36, Federal Rules of Civil Procedure, you are requested to admit for purposes of the pending action only the truth of the following matters, each of which is stated as a fact in the affidavit of Edward A. Brill, Esq., sworn to on September 23, 1975, in support of plaintiff's notice of motion for a protective order dated September 23, 1975 served upon the undersigned on the same date:

13. Ajax received a total of \$249,917. from the United States Government in settlement of termination claims submitted by Ajax on behalf of itself and its subcontractors for losses arising out of the termination of Department of Army contract No. DAA09-67-C-0039.
14. Ajax submitted its initial claim (Form DD540) to the U. S. Army, as reflected in Exhibit 2 attached to the above mentioned motion papers, on or about May 9, 1967.
15. On August 3, 1967, Ajax received \$50,000. from the United States of America as a partial payment of its own claim against the U. S. Army on account of the termination of the aforementioned contract.



16. On November 21, 1967, Ajax received \$50,000. from the United States of America as a partial payment of its own claim against the U. S. Army on account of the termination of the aforementioned contract.
17. Ajax received the further sum of \$50,640.01 on the application for partial payment which is referred to in Item 2 above.
18. Ajax received the further sum of \$6,237. on the application for partial payment which is referred to in Item 4 above.
19. Ajax received the further sum of \$18,234.45 on the application for partial payment which is referred to in Item 5 above.
20. Ajax received the further sum of \$2,537.50 on the application for partial payment which is referred to in Item 6 above.
21. Subsequent to March 25, 1969, Ajax received the further sums of \$72,258.04 and \$10.00 under the agreement which is referred to in Item 12 above, which included \$20,000. for the claim of Time & Micro Instruments, Inc.

Dated: New York, N. Y.  
September 24, 1975

Yours, etc.

MONASCY CHAZEN & STREAM

By 

Arnold C. Stream, a member thereof  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1980

TO: POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION, :

Plaintiff, :

69 Civil 1900 (RHL)

-against- :

STIPULATION

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

-----X  
IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto to dispose of matters now pending before the Court, namely Defendant's Request for Production of Documents, dated September 10, 1975, Plaintiff's Motion for a Protective Order and Other Relief, dated September 23, 1975, Defendant's Requests for Admissions, dated September 24, 1975, and Defendant's Cross-Motions Pursuant to F.R.Civ.P. Rules 36 and 37, dated September 25, 1975, as follows:

1. In response to Defendant's Requests for Admissions, dated September 24, 1975, plaintiff admits the genuineness of the documents described therein, and numbered 1 through 12, with the following corrections:



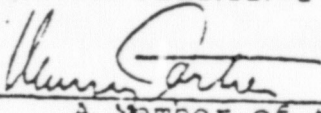
- a. Request No. 7 -- Change "U.S. Army" to  
"Defense Contract Administration Services Region  
Los Angeles"
- b. Request No. 12 -- Change "Howard J. Klein" to  
"Harry R. Gewertz"

Plaintiff admits the truth of the matters stated therein,  
and numbered 13 through 21, with the following correc-  
tion:

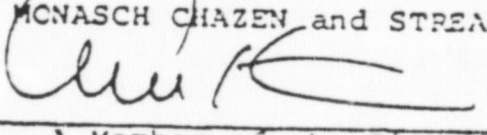
- c. Request No. 21 -- Add "representing a property  
disposal credit," following "\$10.00"
2. Defendant hereby withdraws its Request for Produc-  
tion of Documents, dated September 10, 1975, and  
its Cross-Motion Pursuant to F.R.Civ.P. 37, dated  
September 25, 1975.
3. Plaintiff hereby withdraws its Motion for Protective  
Order and Other Relief, dated September 23, 1975.

Dated: New York, New York  
September 30, 1975

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By   
A Member of the Firm  
Attorneys for Plaintiff  
AJAX HARDWARD MANUFACTURING CORP.  
777 Third Avenue  
New York, New York 10017  
(212) 688-3200

MCNASCH CHAZEN and STREAM

By   
A Member of the Firm  
Attorneys for Defendant  
INDUSTRIAL PLANTS CORPORATION  
733 Third Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

69 Civil 1900 (PHL)

:  
NOTICE OF INTENTION TO  
SEEK THE AMENDMENT OF  
: THE PRE-TRIAL ORDER

S I R S :

PLEASE TAKE NOTICE that the undersigned will move this Court at the opening of the trial of this action to amend Article 3(c) of the pre-trial order (setting forth defendant's contentions) so as to add the following items thereto:

\* \* \*

"1(viii) Plaintiff by its acceptance of the appraisal and payment therefor waived any right to claim a breach of agreement.

1(ix) Plaintiff, having fully mitigated its damages, is not entitled to



recover in this action."

PLEASE TAKE FURTHER NOTICE that the undersigned will also move this Court at the opening of the trial of this action to amend Article 9 of said pre-trial order (stating the issues to be tried) so as to add the following items thereto:

\* \* \*

"(2a) Did the plaintiff waive its right to claim a breach of the aforementioned agreement with plaintiff?"

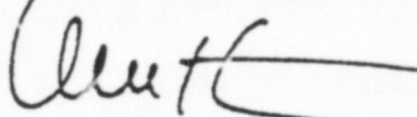
\* \* \*

"(6a) Did the plaintiff mitigate in whole or in part its claimed damages?"

Dated: New York, N. Y.  
October 2, 1975

Yours, etc.

MONASCH CHAZEN & STREAM



By Arnold C. Stream, a member thereof  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1830

TO: POLETTI, FREIDIN, PRASHKER,  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

: 69 Civil 1900 (RHL)

Plaintiff,

: SECOND NOTICE OF INTENTION TO  
: AMEND DEFENDANT'S ANSWER

-against-

INDUSTRIAL PLANTS CORPORATION, :

Defendant.

:

-----X

S I R S :

PLEASE TAKE NOTICE that pursuant to Rule 15 of the  
Federal Rules of Civil Procedure the undersigned will move this  
Court at the opening of the trial of this action for leave to add  
as an affirmative defense the following:

"AS AND FOR AN AFFIRMATIVE  
DEFENSE TO ALL COUNTS

Plaintiff entirely mitigated  
the damages which it seeks to  
recover under each and all of the  
counts stated in its complaint, by reason



of which the plaintiff is precluded  
from any recovery in this action."

Dated: New York, N. Y.  
October 2, 1975

Yours, etc.

MONASCH CHAZEN & STREAM

By 

Arnold C. Stream, a member thereof  
Attorneys for Defendant  
Office & P. O. Address  
733 Third Avenue  
New York, N. Y. 10017  
(212) 867-1880

TO: POLETTI, FREIDIN, PRASHKER,  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

69 Civ. 1900 (RHL)

-against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

AFFIDAVIT IN OPPOSITION  
TO DEFENDANT'S NOTICE OF  
INTENTION TO AMEND ANSWER  
AND PRE-TRIAL ORDER  
-----X

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK)

EDWARD A. BRILL, being duly sworn, deposes and says:

1. I am trial counsel for plaintiff in the above-entitled action. I make this affidavit in opposition to defendant's self-styled "Notice of Intention to Amend Defendant's Answer", "Second Notice of Intention to Amend Defendant's Answer", and "Notice of Intention to Seek the Amendment of the Pre-Trial Order". Defendant's purported motions to add new issues to this case "at the opening of the trial" are not only procedurally defective in all important respects, but are totally without factual merit or support, and should be dismissed by the Court without further consideration.

2. Defendant has dashed off another series of "instant" motions, utterly without regard for the requirements



of the Federal Rules of Civil Procedure, or the Local Rules of this Court. Defendant's latest "motions" give plaintiff "notice" of defendant's intention to move this Court at the opening of the trial of this action for leave to add an affirmative defense to plaintiff's breach of contract claim, and an affirmative defense of mitigation of damages to all of plaintiff's claims. Defendant has filed no supporting papers with its statements of intention, and none of the "notices" contains even a statement of the particular grounds supporting the application, in accordance with the requirements of F.R. Civ.P., Rule 7(b) (1), let alone an affidavit in conformance with F.R.Civ.P., Rule 43(e). Moreover, Rule 9(b) of the Local Rules of this Court requires that the moving party "serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion..." The rule further provides that a failure to file such a memorandum may be deemed sufficient cause for the denial of the motion. Clearly, these rules are designed to prevent exactly the tactics which defendant in this case seeks to follow. A party must give notice of the factual and legal grounds of a motion to the opposing side before argument of the motion. The opening day of trial is not the time for defendant to pull hidden facts and theories out of a hat so that plaintiff has no fair opportunity to respond. Despite the ample time which has passed even since plaintiff served the so-called notices of intention, no affidavits, memoranda or other

supporting papers have been served upon plaintiff.

3. Plainly, it is not within the contemplation of the Federal Rules that the plaintiff assume the burden of showing why a motion should not be granted every time the defendant serves a naked notice for some relief. Nonetheless, since the Court has not stricken defendant's defective notices of intent to make motions, plaintiff is put in the position of responding to an "intention".

4. Defendant seeks to add an affirmative defense of waiver to plaintiff's breach of contract claim, based upon plaintiff's alleged "conscious acceptance of and payment for the appraisal." Defendant does not indicate that there is any newly discovered evidence or other factual support for this supposed defense, other than that which was offered at the first trial of this action. On the basis of that evidence, the judge instructed the jury that payment of defendant's fee did not constitute a waiver of defects in the performance of the contract. If defendant has no additional proof to offer, there is no apparent reason to clutter the pleadings with an additional defense, already determined to be insufficient. If defendant does intend to offer additional proof as to the "conscious" state of mind of anyone, concerning payment of defendant's fee, plaintiff is entitled to know what that additional evidence is.



5. Defendant further seeks, again without any supporting facts or legal explanation, to add an affirmative defense that "plaintiff entirely mitigated the damages which it seeks to recover under each and all of the counts stated in its complaint ..." Defendant apparently intends to argue that the \$249,917 received by Ajax from the government in 1968 and 1969 in settlement of termination claims submitted by Ajax on behalf of itself and numerous subcontractors for losses directly caused by the government's termination of a fuse contract, mitigates plaintiff's damages in this case. Yet, no part of that sum represents government compensation for Ajax's loss on the loan guarantee for Time & Micro, as the documents supplied by plaintiff on September 23, 1975 demonstrate. The only explanation ever offered by defendant in support of the purported relevance of Ajax's contract termination claim to this lawsuit was that Ajax claimed and received compensation for that loan guaranty loss (Transcript of September 12, 1975 hearing, pp. 5-7). That explanation has now been shown to have been based upon a mistaken "belief". No new explanation or facts have been offered by defendant in support of this new defense. Certainly, if there are compelling reasons which justify amendment of the answer and pre-trial order in this action, plaintiff and the Court are entitled to know what those reasons are before the day on which the trial begins, and to know, in addition, what facts defendant intends to prove in support of the new defense. If defendant intends

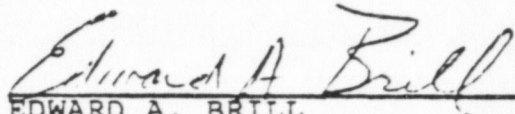
to rely solely on the documents and fa admissions in its Requests for Admissions, dated September 25, 1975, then the intended defense of mitigation is patently without merit and such an amendment should not be allowed.

6. The inexcusable and unexplained delay by defendant in seeking to amend its answer and the pre-trial order six years after this action was begun, a year and a half since the pre-trial order was signed, and five months after the first trial was completed, is, in itself, sufficient ground to deny the proposed amendments to the answer and pre-trial order. See Anderson v. National Products Co., 253 F.2d, 834, 838 (2d Cir. 1958), cert. den., 35 7 U. S. 906 (1958); 3 Moore's Federal Practice, ¶ 15.08 [4], at p. 898, n. 6. The pre-trial order might not be a "straight jacket" as this Court has remarked, but neither is it to be modified unless such modification is necessary "to prevent manifest injustice". F.R. Civ. P. Rule 16. At the very least, defendant is required to demonstrate the facts and legal authority which make such modification necessary. Defendant has not done so, even in the two weeks since it served its initial "Notice of Intention" on September 25, 1975 or in the week which has passed since the pre-trial conference on October 2, 1975.

WHEREFORE, defendant's notices of intention to Amend



Defendant's Answer and the Pre-Trial Order should be vacated.

  
EDWARD A. BRILL

Sworn to before me this  
8<sup>th</sup> day of October, 1975

  
NOTARY PUBLIC, STATE OF NEW YORK

SUSAN G. BENOIT  
Notary Public, State of New York  
No. 31-4606536  
Qualified in New York County  
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :  
 :  
Plaintiff, : 69 Civ: 1900 (RHL)  
 :  
-against- : PLAINTIFF'S  
 : REQUESTS  
INDUSTRIAL PLANTS CORPORATION, : TO CHARGE  
 :  
Defendant. :  
-----X

Plaintiff requests that the Court charge the jury in accordance with the Requests to Charge and Supplemtal Requests to Charge submitted on the first trial of this action (Numbered 1-30), except that plaintiff requests that the Court charge in accordance with Request No. 31, submitted herewith, instead of original Request No. 18 on the issue of compensatory damages. Plaintiff reserves the right to submit revised or additional Requests to Charge, based on the developments during the trial. We will submit such new requests at the appropriate time.

Dated: New York, New York  
October 9, 1975

Respectfully submitted,

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, New York 10017  
[212] 688-3200



31. Compensatory Damages

The parties in this case have stipulated that the amount of compensatory damages to which plaintiff is entitled, if you should find for the plaintiff on any one of its three causes of action, is \$161,895.75. I charge you that if you find that defendant is liable to plaintiff for negligence, breach of contract, or fraud, you must award plaintiff \$161,895.75 in compensatory damages.

You may then consider the question of the additional amount of punitive or exemplary damages, if any, to which plaintiff is entitled.

10-24-71

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

69 Civ. 1900 (RHL)

-against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

PLAINTIFF'S ADDITIONAL  
SPECIAL VERDICT QUESTION

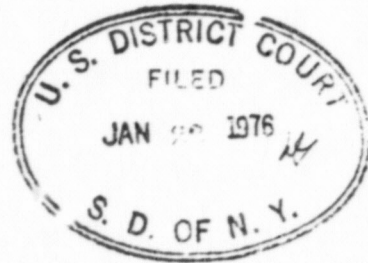
-----X

Compensatory Damages

- A) Amount of actual damages suffered  
by Ajax (not disputed in evidence) \$161,895.75
- B) Amount by which compensatory damages  
are reduced by reason of actual  
mitigation (not to exceed \$20,000) \$ \_\_\_\_\_
- C) Total Compensatory Damages to  
Which plaintiff Is Entitled  
(A minus B) \$ \_\_\_\_\_



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
AJAX HARDWARE MANUFACTURING CORPORATION, :

Plaintiff, :

-against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :  
-----X

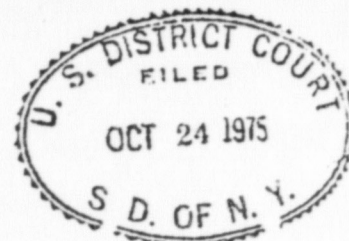
69 Civ. 1900 (RHL)

PLAINTIFF'S ADDITIONAL  
REQUEST TO CHARGE

32. Compensatory Damages (Alternative, in the event Requested Charge No. 31 is refused).

The evidence in this case does not present a dispute as to the amount of compensatory damages to which plaintiff is entitled, if you should find for plaintiff on any one of its three causes of action. The amount of plaintiff's compensatory damages is, therefore, fixed at \$161,895.75, which is the amount of Ajax's actual net out-of-pocket loss on its guarantee of the loan to Time & Micro. I charge you that if you find the defendant is liable to plaintiff for negligence, breach of contract, or fraud, you must award plaintiff \$161,895.75 in compensatory damages.

You may then consider the question of the additional amount of punitive or exemplary damages, if any, to which plaintiff is entitled.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
AJAX HARDWARE MANUFACTURING  
CORPORATION

Plaintiff :

-against-

INDUSTRIAL PLANTS CORPORATION

Defendant  
----- X

69 Civil 1900 (RHL)

JUDGMENT

Microfilm  
9012455

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Richard H. Levett, United States District Judge, and a jury, on October 14, 15, 16, 17, 20, 21, 22, and 23, 1975, and the Court having submitted the attached special questions to the jury, and the jury having answered the said questions, and the jury thereafter having returned a verdict in favor of the defendant, and the Court having directed the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendant INDUSTRIAL PLANTS CORPORATION, have judgment against plaintiff AJAX HARDWARE MANUFACTURING CORPORATION, dismissing the complaint, with costs to be taxed.

Dated: New York, N.Y.  
October 24, 1975

*Richard H. Levett*  
Clerk

APPROVED:

*Richard H. Levett*  
U.S.D.J.

A-249



SPECIAL VERDICT

PART I.

1. Has plaintiff (Ajax) proved by a fair preponderance of the credible evidence that on or about August 12, 1966 defendant (Industrial) entered into a contract to appraise the dollar amount which in defendant's opinion could be realized from the sale of individual items of machinery and equipment at the Time & Micro plant at a forced or liquidation sale?

Yes      X  
                    No

If your answer to question 1 is "Yes," proceed to question 2.

If your answer to question 1 is "No," omit all further questions and sign the Special Verdict on the last page.

2. Has plaintiff proved by a fair preponderance of the credible evidence that defendant breached said contract (referred to in question 1)?

Yes      No

If your answer to question 2 is "Yes," proceed to Part II, Damages.

If your answer to question 2 is "No," omit all further questions and sign the Special Verdict on the last page.

PART II.

DAMAGES

3. Has plaintiff proved by a fair preponderance of the credible evidence that it relied upon defendant's appraisal when it agreed to guarantee a bank loan made to Time & Micro and that a loss suffered by plaintiff by reason of this agreement to guarantee a bank loan made to Time & Micro was the natural and probable consequence of a breach of contract as stated in question 2?

Yes      No

If your answer to question 3 is "Yes," proceed to question 4.

If your answer to question 3 is "No," omit question 4 and sign the Special Verdict on the last page.



4. What is the amount to which plaintiff is entitled for damages? \$ \_\_\_\_\_

5. (a) What is the amount by which said damages are reduced by reason of recovery received by plaintiff from the government, if any (not to exceed \$20,000). \$ \_\_\_\_\_

(b) Balance (difference between amount in question 4 and amount in question 5(a)) \$ \_\_\_\_\_

SIGN SPECIAL VERDICT ON THE LAST PAGE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
:  
AJAX HARDWARE MANUFACTURING  
CORPORATION, :

Plaintiff, : 69 Civ. 1900 (RHL)

-against- : NOTICE OF APPEAL

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

-----X  
S I R S:

PLEASE TAKE NOTICE that AJAX HARDWARE MANUFACTURING CORPORATION, plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on October 28, 1975, and from each and every part thereof, including, without limitation, (a) the order of this Court dated and entered herein on May 28, 1975, setting aside the verdicts of the jury as to both liability and damages rendered on May 1, 1975 in the first trial of this action and ordering a new trial on all issues, and which order further denied plaintiff's motion for judgment notwithstanding the verdict in the amount of \$161,895.75, or for a new trial limited to the issue of damages,

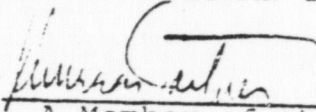


and (b) the order of this Court dated June 23, 1975 denying plaintiff's motion under 28 U.S.C. § 455 for disqualification of the Hon. Richard H. Levet from further participation in any proceedings in this action.

Dated:

New York, New York  
November 25, 1975

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By   
A Member of the Firm

Attorneys for Plaintiff  
AJAX HARDWARE MANUFACTURING  
CORPORATION  
777 Third Avenue  
New York, New York 10017  
212 / 688-3200

TO:

MONASCH CHAZEN & STREAM  
Attorneys for Defendant  
733 Third Avenue  
New York, New York 10017

CLERK  
United States Court of Appeals  
for the Second Circuit

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----x

:  
: 69 Civ. 1900 (RHL)

: NOTICE OF MOTION  
:

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Murray Gartner, Esq., and Edward Brill, Esq., and all prior proceedings had herein, the undersigned, on behalf of AJAX HARDWARE MANUFACTURING CORPORATION, plaintiff in the above entitled action, will move this Court before the Hon. Richard H. Levett, at Room 2103, United States Courthouse, Foley Square, New York, New York on March 25, 1976 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order pursuant to Rules 10(c) and 10(e) of the Federal Rules of Appellate Procedure correcting the Record on Appeal in this action by adding thereto the attached "Statement of Proceedings in District Court To Be Included in Record on Appeal"; and take further notice that any objection or proposed amendments to the



annexed statement must be served upon plaintiff within ten (10) days after service of this Notice.

Yours, etc.

Dated: New York, N.Y.  
March 11, 1976

POLETTI FREIDIN  
PRASHKER FELDMAN & GARTNER

By: 

A Member of the Firm  
Attorneys for Plaintiff  
AJAX HARDWARE MANUFACTURING CORP.  
777 Third Avenue  
New York, New York 10017  
(212) 688-3200

TO: Monasch Chazen & Stream  
733 Third Avenue  
New York, New York 10017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----x

: 69 Civ. 1900 (RHL)

: STATEMENT OF PROCEEDINGS  
: IN DISTRICT COURT TO BE  
: INCLUDED IN RECORD ON  
: APPEAL

1. Submission by Defendant of Ex Parte Documents

Defendant Industrial Plants Corporation, by its attorneys Monasch Chazen and Stream, submitted the documents described below to the trial court in this action without service of said documents upon attorneys for plaintiff, and without notifying attorneys for plaintiff of the submission of said documents to the court. The "Trial Outlines" and "Memorandum of Law" described below were received and accepted by the trial court despite the court's knowledge that those documents were not served upon or delivered to plaintiff's attorneys.

- (1) "Defendant's Trial Outline" (undated, receipt by Court indicated on February 23, 1973)
- (2) "Defendant's Trial Outline" (undated, receipt by Court indicated on April 14, 1975)



- (3) "Defendant's Memorandum of Law on Contract Waiver" (undated, receipt by court indicated on October 10, 1975)
- (4) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated February 19, 1974
- (5) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated October 2, 1975
- (6) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated October 10, 1975.

The original copy of each of the above documents is contained in the file of this action in the office of the Clerk of the United States District Court for the Southern District of New York. Said original documents, together with this Statement, and the affidavits submitted in connection with this Statement, shall be included in the Record on Appeal transmitted to the Court of Appeals in Docket No. 75-7663.

3. Submission by Hon. Richard H. Levet of Ex Parte Statement to United States Court of Appeals for Second Circuit

On or about April 21, 1975, Hon. Richard H. Levet submitted a statement to the United States Court of Appeals for the Second Circuit in connection with an application by plaintiff in this action for a writ of mandamus against Judge Levet, which was pending at that time before the Court of Appeals. Ajax Hardware Manufacturing Corporation v. Levet, Docket No. No. 75-3021. Judge Levet at no time served a copy of that

statement, upon attorneys for plaintiff, nor did Judge Levet  
notify or inform attorneys for plaintiff of the delivery of  
said statement to the Court of Appeals.

Dated: New York, New York  
March 4, 1976



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

:  
: 69 Civ. 190 (RHL)

:  
: AFFIDAVIT

-----X  
STATE OF NEW YORK )  
                              :SS.  
COUNTY OF NEW YORK)

EDWARD A. BRILL, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Poletti Freidin Prashker Feldman & Gartner, attorneys for plaintiff in the above-entitled action. I am fully familiar with all prior proceedings in this action, having assisted in the first trial and acted as trial counsel during the second trial of this case. I make this affidavit in support of plaintiff's motion to correct the Record on Appeal pursuant to Rules 10(c) and 10(e) of the Federal Rules of Appellate Procedure, by adding thereto the attached Statement of Proceedings in the District Court.

2. Plaintiff has filed a Notice of Appeal from the final judgment of dismissal entered herein on October 28, 1975. The appeal has been docketed in the United States Court of Appeals

for the Second Circuit as Docket No. 75-7663. Pursuant to the terms of the Civil Appeal Scheduling Order dated February 23, 1976, the record on appeal must be filed on or before March 15, 1976. However, the parties have agreed, subject to the approval of the Court of Appeals, to extend the time for filing the record on appeal to April 15, 1976.

3. In order to prepare the Record on Appeal for filing in the Court of Appeals, I personally reviewed the items contained in the file of this action, located in the office of the Clerk of the Court, on several dates during December 1975 and January 1976. During this review of the file, I discovered that the court's file contained certain documents submitted by defendant which had never been served upon or received by plaintiff and which I did not know had been submitted to the Court. The originals of each of these documents, copies of which are annexed hereto as Exhibits 1 through 6, are contained in the file of this action located in the office of the Clerk of the Court. I made a copy of each of the following documents from the originals located in the offices of the court clerk. These documents are:

- (1) "Defendant's Trial Outline", undated, receipt by Court indicated on February 28, 1973 (Exhibit 1);
- (2) "Defendant's Trial Outline", undated, receipt by Court indicated on April 14, 1975 (Exhibit 2);
- (3) "Defendant's Memorandum of Law on Contract Waiver", undated, receipt by Court indicated on October 10, 1975 (Exhibit 3);
- (4) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated February 19, 1974 (Exhibit 4);
- (5) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated October 2, 1975 (Exhibit 5);
- (6) Letter from Arnold C. Stream to Hon. Richard H. Levet, dated October 10, 1975 (Exhibit 6).



4. I found the original of each of the documents listed in Paragraph 3, above, intermixed with the other original papers filed by both parties in this action. The original of each of the said documents (1), (2), (3) and (4) contained a handwritten notation of receipt with a date similar to that contained on other original papers filed with the Court. None of the said documents contains proof of service upon plaintiff. None of the documents is listed on the official docket of this action maintained by the Clerk of the Court; or indicates filing with the Clerk of the Court. However, Judge Levet requires that all papers be filed directly in his chambers, and not with the Clerk of the Court, so it is possible for the Judge to receive papers without proof of service. Moreover, the files in this case were kept in Judge Levet's chambers until the conclusion of the second trial.

5. I have carefully reviewed our files and have verified that the office never received a copy of the three memoranda of law (Exhibits 1, 2 and 3), nor did we ever receive a copy of the three letters from Mr. Stream to Judge Levet (Exhibits 4, 5 and 6) (Although the letters dated February 19, 1974 (Exhibit 4) and October 2, 1975 (Exhibit 5) indicate a copy to Poletti Freidin Prashker Feldman & Gartner, the firm did not receive a copy of either letter.) Every legal document served upon this law firm is immediately entered in a central docket diary, as well as kept in a chronological bound file of all legal documents in the case. There is no record of receipt of these memoranda. Moreover, I would have been immediately aware of the receipt of such memoranda,

if they had been received, and can assure this Court that no copy of these documents was delivered to this firm. No notice, either oral or written, was ever given to plaintiff's attorneys of the filing of these documents.

6. I also located in the files of this action, a copy of a Memorandum submitted by this Court to the United States Court of Appeals for the Second Circuit, dated April 21, 1975 at 10:10 a.m. in connection with an application for a writ of mandamus by plaintiff, Ajax Hardware Manufacturing Corporation v. Levet, Docket No. 75-3021. (A copy is annexed hereto as "Exhibit 7"). No copy of that statement was ever received by plaintiff's attorneys, nor were plaintiff's attorneys notified that a statement was submitted by Judge Levet in connection with the mandamus proceeding. The original of Exhibit 7 is contained in the files of the clerk of the Court of Appeals in Docket No. 75-3021.

Sworn to before me this  
5<sup>th</sup> day of March, 1976.

Barbara A. Lee  
Notary Public

BARBARA A. LEE  
Notary Public, State of New York  
No. 31-7468040  
Qualified in New York County  
Commission Expires March 30, 1976

Edward A. Brill  
Edward A. Brill



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING :  
CORPORATION, :

Plaintiff, :

--against- :

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :  
-----X

AFFIDAVIT

STATE OF NEW YORK )  
:SS  
COUNTY OF NEW YORK)

MURRAY GARTNER, being duly sworn, deposes and says:

1. I am a member of the firm of Poletti Freidin Prashker Feldman & Gartner, attorneys for plaintiff in the above-entitled action. I am fully familiar with the proceedings had in the District Court in this case, as trial counsel for plaintiff during the first trial, and as a supervising attorney during the second trial which was conducted by my associate, Edward Brill. I make this affidavit in support of the within motion to correct the Record on Appeal, by adding thereto the attached Statement of Proceedings in the District Court.

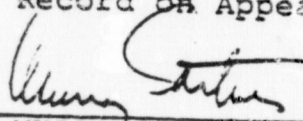
2. I have examined the copies of the memoranda and correspondence described in the attached affidavit of Edward Brill, Esq. and attached thereto as Exhibits 1 through 7. I had never

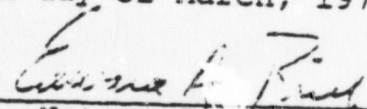
seen any of those documents prior to my viewing the copies which Mr. Brill made in the offices of the District Court Clerk. I never received notice from attorneys for defendant that the originals of the legal memoranda and letters (Exhibits 1, 2, 3, 4, 5 and 6) were submitted to the Court, and was not aware that said documents had been submitted to the Court until Mr. Brill reported to me that he had discovered them in the court files.

3. I have similarly reviewed the "memorandum" of this Court, dated April 21, 1975, a copy of which is attached to the affidavit of Edward Brill as Exhibit 7. I had never seen a copy of that document prior to viewing the copy which Mr. Brill made from the copy located in the Court file of this action. I had never been served with a copy of the statement, nor had I been notified by the District Court or by any other person that the statement was filed in connection with the application for a writ of mandamus.

4. In accordance with Rules 10(c) and 10(e) of the Federal Rules of Appellate Procedure, the Court should grant plaintiff's motion to correct the Record on Appeal.

Sworn to before me this  
5th day of March, 1976

  
MURRAY GARTNER

  
Notary Public

EDWARD A. BRILL  
Notary Public, State of New York  
No. 4503338  
Qualified in New York County  
Commission Expires March 20, 1977

A-265



EXHIBIT 1 TO EDWARD BRILL'S AFFIDAVIT

Arnold C. Stream,  
Trial Counsel

*Recd  
2/2/73  
Rv*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
AJAX HARDWARE MANUFACTURING CORPORATION, :  
Plaintiff, :

-against-

INDUSTRIAL PLANTS CORPORATION, :  
Defendant. :  
----- x

69 Civ. 1900

DEFENDANT'S TRIAL OUTLINE

Arnold C. Stream,  
Trial Counsel

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff, :

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant. :

DEFENDANT'S  
TRIAL OUTLINE

69 Civ. 1900

----- x

Preliminary Statement

This brief will outline the testimony to be adduced by us in behalf of the defendant and will indicate the documents which, marked for identification during pretrial depositions, will be offered by us.

These documents will be identified herein by their pretrial exhibit number followed by a numeral which simply facilitates our locating the exhibits under our internal index system.

Except where we specifically indicate otherwise, authenticity of all documents referred to is admitted



and only objections on grounds of relevance or materiality are reserved.

Parties Involved

The following list will provide a convenient place of reference of parties whose names will come up during the trial.

AJAX HARDWARE CORP.

Norman Louis - President

\*Howard Klein - Executive Vice President

TIME & MICRO INSTRUMENTS, INC.

Harry Haakenson

HIRSCHMANN CORP.

\*Martin H. Kaefer

INDUSTRIAL PLANTS CORP.

David Kriser - President

Sidney Kriser - Secretary

\*Jesse Thaler - Vice President

---

\* Depositions to be read.

### Master Chronology

The following is an outline of dates of critical events:

<u>August 10, 1966:</u>	Klein calls Thaler
<u>August 12, 1966:</u>	Thaler visits Klein
<u>August 15, 1966:</u>	Appraisal
<u>August 19, 1966:</u>	Telegram and confirming letter with appraisal sent to Ajax along with invoice for \$4,422.71 computed on the basis of fair market value
<u>August 23, 1966:</u>	Louis letter requesting in addition the liquidation value of the machinery and equipment
<u>August 29, 1966:</u>	Defendant's letter offering a guarantee of buy-out at \$350,000.
<u>October 7, 1966:</u>	Letter from Thaler defining fair market value basis of an appraisal
<u>November 30, 1966:</u>	Ajax pays \$4,422.71, being amount of invoice based on fair market value computation
<u>October, 1967</u>	Forced liquidation sale of Time : Micro machinery and equipment at public auction conducted by the defendant



### Basic Issue Involved

As we see it, the basic issue here is Did the defendant deliver to the plaintiff the kind of appraisal which the latter contracted for? If it did, the plaintiff cannot, by comparing that fair market value appraisal with amounts realized from a forced liquidation sale at public auction, ask the jury to infer that, by virtue of the discrepancy between appraised value and amounts realized at auction, the appraisal was negligently prepared. For a fair market value appraisal of machinery and equipment in place is entirely different from an appraisal intended to reflect a forced sale in liquidation at a public auction.\*

### Order of Proof

The following testimony will be offered by

---

\* An extension of our legal position and construction of the issue involved is reflected in our Requests To Charge, making it unnecessary for us to repeat those views here at further length.

the defendant on the issue of liability:\*

Jesse Thaler

Martin H. Kaefer

Sidney Kriser

---

\* The issue of damages is being reserved from the jury until the liability issue is determined. Testimony on damages and mitigation of damages is omitted from this brief.



JESSE THALER

This witness, examined before trial, is a resident of Florida and because of ill health cannot attend this trial. He is no longer an employee of the defendant.

The following testimony was elicited during his examination before trial by the plaintiff's counsel and parenthetical references are to pages in the transcript.

He was Vice President of defendant corporation ("Industrial") during 1966 and had held that office since 1946 (3).

During the same period, David Kriser was President and Sidney Kriser was Treasurer of Industrial (3).

Robert Botwinick joined Industrial around 1963 and became its auctioneer; Jesse Thaler acted primarily as the appraiser for Industrial (4).

Thaler specialized in appraisal of machinery tool and industrial equipment for over 25 years (6). He is a Senior Member of American Society of Appraisers (6).

[Witness described his experience (7-29)]

Memorandum of Pedigree marked (28).

Ex. 1; (35)  
Thaler Memo of  
Pedigree

Thaler first heard of plaintiff ("Ajax") in 1966 when he received a phone call from a Mr. Sax stating that Ajax wanted an appraisal of a manufacturing plant in Strassburg, Pennsylvania (30). Three or four days later, Thaler met with Howard Klein, Vice President of Ajax (34) to discuss the proposed appraisal (31).

At that meeting, Thaler agreed to do the appraisal of Time & Micro Instruments, Inc. ("Micro") and they set a time for the appraisal about a week from the date of the meeting (35). Fee arrangements were also worked out (35).



Klein asked Thaler to appraise the Micro facility on the basis of "the value of the plant in place and ready for operation, continued operation." Klein impressed Thaler that it was urgent because Ajax was negotiating with the Government for the production of fuses (35-36). Klein told Thaler that Ajax was acquiring the plant from Micro (36-37).\*

Klein told Thaler that he needed the appraisal very quickly and that he would give him an appraisal previously made by another company; he also told him he would arrange to have a Mr. Haakenson, who was to be the vice president in charge of manufacturing at Micro, accompany him to help him do the appraisal (37-38).

Klein told Thaler to rely on the Hirschmann appraisal, merely to update it (44). He said that he was looking for a \$600,000 figure to support financing; but Thaler replied that he would give actual values (51).

Klein also told Thaler that Hirschmann was the agent for manufacturers and knew values, and that its figures were accurate and reliable as of 1964 (56-57); that Thaler could also rely on Haakenson's values in order to expedite matters (62). He told Thaler there was no time to make an independent determination but that he, Thaler, would have to simply rewrite the Hirschmann report (64).

Later at that meeting, the date of the appraisal was moved up from one week to the next day (39) and Klein gave to Thaler a copy of the earlier (1964) appraisal (41). Hirschmann Corporation.

Ex. 2; (2) Appraisal dtd. 7-1-64 of

---

\*Micro's name was then Precision Instruments, Inc.

*superseded*

Klein asked Thaler to appraise the Micro facility on the basis of "the value of the plant in place and ready for operation, continued operation." Klein impressed Thaler that it was urgent because Ajax was negotiating with the Government for the production of fuses (35-36).

Klein told Thaler that Ajax was acquiring the plant from Micro (36-37).\*

Klein told Thaler that he needed the appraisal very quickly and that he would give him an appraisal previously made by another company; he also told him he would arrange to have a Mr. Haakenson, who was to be the vice president in charge of manufacturing at Micro, accompany him to help him do the appraisal (37-38).

Later at that meeting, the date of the appraisal was moved up from one week to the next day (39) and Klein gave to Thaler a copy of the earlier (1964) appraisal (41).

Ex. 2; (2)  
Appraisal dtd.  
7-1-64 of  
Hirschmann Cor  
ration

---

\* Micro's name was then Precision Instruments, Inc.



[The witnesses identified certain appendages to the appraisal (60, 100)]

Ex. 2A; (1)  
Appraisal  
Summary

Ex. 2B; (2)  
Adding Machi:  
Tape

Ex. 2C; (2)  
Another Addi:  
Machine Tape

Whereas Klein asked for "a market value appraisal of the plant intact, in place, ready for operation", Norman Louis subsequently wrote to Thaler and asked him to define what was meant in the appraisal as "fair market value." He then added that he "would also like for our own information, what in your opinion the equipment would bring under a forced sale." (69-70)

Ex. 3; (7)  
Ajax letter c  
8/23/66

Returning, then, to his meeting with Klein, Thaler said that Klein arranged by telephone for Thaler to meet Haakenson (79).

On their air trip down to Pennsylvania, Thaler and Haakenson discussed the equipment (85). He told Thaler about the difficulty in getting equipment from Switzerland because, unless one was a member of the syndicate, it could not be ordered; and even then it would take two or three years to assemble it into a single operating plant. (85-86).

*superseded*

[The witness identified certain appendages to the appraisal (60, 100)]

Ex. 2A; (2)  
Appraisal Summa:

Ex. 2B; (2)  
Adding Machine  
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Ex. 2C; (2)  
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Whereas Klein asked for "a market value appraisal of the plant intact, in place, ready for operation", he subsequently wrote to Thaler and asked him to define what was meant in the appraisal as "fair market value." He then added that he "would also like for our own information, what in your opinion the equipment would bring under a forced sale." (69-70)

Ex. 3; (7)  
Ajax letter dtd.  
8-23-66

Returning, then, to his meeting with Klein, Thaler said that Klein arranged by telephone for Thaler to meet Haakenson (79).

On their air trip down to Pennsylvania, Thaler and Haakenson discussed the equipment (85).



[Testimony concerning appraisal methods at Strassburg (86-98)].

When he finished the appraisal, Thaler telephoned Klein in California (99) and told him that he had appraised the Micro machinery at \$919,072. plus \$137,000. for "in place" value (103).

He confirmed his telephone conversation by telegram (107).

Ex. 4; (2)  
TWX dated 8-19-66

On August 19, 1966, Thaler sent Ajax an invoice covering the appraisal which explicitly reflects the fact that the fee is computed as a percentage of "fair market value."

Ex. 11; (6)  
Industrial Plants  
Invoice dtd.  
8-19-66

A full appraisal, of course, had been sent to Ajax (142).

Ex. 12; (5)  
Industrial Plants  
Appraisal

The appraisal was sent to Ajax with a covering letter (148).

Ex. 13;(4)  
Industrial letter  
dtd. 8-19-66

Thaler did not recall any conversation with Klein during which the question of liquidating value came up (157).

On August 29, 1966, Thaler received a letter from Klein enclosing a proposed "commitment letter" under which Industrial would guarantee to liquidate the machinery for not less than \$500,000. less 20% per year (170).

Ex. 15;(8)  
Ajax letter dtd.  
8-29-66 with  
attached pro-  
posed "commit-  
ment letter"

Thaler made a note on the letter that no promise had been made to give a "commitment" or a guarantee (171); and Thaler considered Klein's assertion inaccurate (176).

[Asked by counsel whether fair market value was equivalent to replacement value] Thaler said that fair market value was meant to reflect worth to the user in the plant intact, in place (200).



[Thaler thereupon offered counsel his letter to Klein dated October 7, 1966 defining fair market value in very explicit terms (202;272)]\*

Ex. 16;(15)  
Thaler letter to  
Klein dtd.  
10-7-66

This was not the first time Thaler appraised a plant as a going concern; on many previous occasions he evaluated a plant as an in place facility in use (210-211).

[Thaler explained the 15% addition for in place value in terms of the cost of transporting and installing the machinery as a going facility at its site (238-245)]

Thaler received a letter from Klein on October 5, 1966 complaining about the invoice because the appraisal did not reflect a "forced liquidation" figure which he (Klein) knew would be no more than \$450,000. Klein sought an adjustment of the invoice (230).\*\*

Ex. 18;(14.1)  
Klein letter dtd.  
10-7-66

---

\* This is a critical exhibit in our view. Klein received this letter [Klein EBT (12)].

\*\* This is another critical letter since it contains an acknowledgment that the fair market value appraisal was not a liquidation value, and the further acknowledgment of the plaintiff's President that the liquidation value would not be more than \$450,000.

[The last mentioned letter was sent after a duplicate invoice was mailed to and received by Klein (Klein, 12)]

Ex. 19; (14) -  
Duplicate Industrial Plants  
Invoice dtd.  
9-30-66

On November 28, 1966, Thaler wrote a dunning letter to Ajax (256).

Ex. 20; (17)  
Industrial Plants  
letter dtd.  
11-28-66

Klein received that letter [Klein (13)]. Plaintiff marked it as an exhibit (256).

On November 30, 1966, Industrial Plants invoice for \$4,422.71 was paid [Klein (13)].

Thaler produced on request the offer of a stand-by guarantee by Industrial in the sum of \$350,000. (263).

Ex. 22; (12)  
Industrial Plants  
letter dtd.  
8-30-66

[Thaler produced on request his in-place appraisal of Loft Candy Corp. (328); his in-place appraisal of Calmac Manufacturing Corporation (328); and a list of companies for which Thaler made in-place appraisals (329).

Ex. 30  
Loft Candy Corp.  
Appraisal;  
Ex. 31  
Calmac Appraisal;



MARTIN H. KAEFER

Mr. Kaefer was an official of Hirschmann Corp. of Roslyn, Long Island. He made the 1964 appraisal which underlay Thaler's two years later.

His deposition was taken by us in 1970. Since then, he has moved to Connecticut, a distance of something more than 100 miles from the City. We shall subpoena him but if he refuses to appear, we shall ask leave to read his deposition instead.

Mr. Kaefer has been with Hirschmann Corp. for about 14 years; in 1964 he was vice president in charge of engineering (3-5).

Hirschmann Corp. was a distributor of European machinery tools (4). The majority of its equipment comes out of the narrow area known as "the watch area of Switzerland" (5).

Mr. Kaefer identified his 1964 appraisal of the Micro facilities and his letter covering the same to Mr. Jacob Shrirer, then the owner of Micro, (11-12).

Ex. B; (2)  
Kaefer letter dtd.  
7-1-64  
Ex. 2; (2)  
Kaefer Appraisal

[Mr. Kaefer describes his inspection and appraisal methods (15-29).]

Kaefer placed a market value of approximately \$793,000. on the Micro facilities in 1964 and a replacement value of approximately \$1,214,000. (30). A large part of the machinery in question would not have been available through common trade channels; and Micro had machinery at its plant for the repairing and maintenance of that machinery, thus avoiding its deterioration (33-35).

There was therefore no significant depreciation in the utility of the machinery during the two years following his appraisal, assuming normal maintenance (35-36).

Approximately 80% of all the equipment would have retained its market value at the same level in 1966 as it was in 1964 (40).

The most that could have happened is that the \$793,000. value could have shrunk two years later to \$625,000. (42).



As used machinery -- to a dealer in used machinery -- it would be worth no more than \$200,000. (46).

Other precision instrument manufacturing can be done using the precision watch machinery at Micro (67).

Mr. Kaefer reiterated that 80% of the items would have retained their value in 1966 at their 1964 level (72).

HOWARD KLEIN

Howard Klein was Executive Vice President of Ajax in 1964. His deposition was taken by the plaintiff on written interrogatories.

We presume that the deposition will be read by the plaintiff. Whether read by the plaintiff, or by us, his answers will establish the following:

Klein received all the letters which officials of the defendant say were sent to him.

He wrote all the letters attributed to him.

He spoke to Thaler for the second time the day after Thaler called him with the appraisal figure and Thaler told him that although the fair market value of the machinery was approximately \$900,000., "the forced liquidation value was about \$500,000." (8).

Payment of the defendant's fee, based upon its fair market value appraisal, was made about November 30, 1966.

Ajax signed its loan agreement with Time and Micro the day before it received the appraisal.\*

\*Note our supplemental requests to charge on the element of "reliance."



SIDNEY KRISER

Mr. Kriser is President of the defendant; he formerly was Secretary and a Vice President. Mr. Kriser will explain the nature of the business of the defendant.

His first dealing with Ajax was in 1966 when he received a telephone call and referred the party to Mr. Thaler, since it was an appraisal matter.

Sometime later, he got a telephone call from Kline asking for a guarantee; but this was after the appraisal had been made.

As a result of the conversation, he wrote a letter to Kline dated August 30, 1966.

Ex. 22; (12), sup

Before the letter was written, Mr. Kriser had a conversation with David Weissman, Esq., representing the plaintiff and Micro; following the conversation, he wrote to Mr. Weissman a proposal for an advance of \$300,000., secured by the Micro machinery.\*

(9)  
Kriser letter dtd.  
8-29-66

---

\* Not covered by stipulation of authenticity.

Mr. Kriser had no conversation with Mr. Thaler before the appraisal; the appraisal was routine business and 98% of appraisals were done by Mr. Thaler, who had been doing them for 35 to 40 years.

Fair market value is a value for equipment in use where there is a willing seller and a willing buyer, given sufficient time to transact the business.

Fair market value appraisals can concern dual items as part of the totality of a going operation.

An auction or liquidating value is given in a manner different from the appraisal prepared here for the plaintiff. When an auction or liquidating value is given for a plant, Industrial does not list or value each piece of equipment; it simply gives a bulk figure.

In referring to the guarantee of \$350,000., Mr. Kriser had in mind what Industrial was prepared to pay for all the machinery in place against its immediate resale in liquidation.



At some point after he made the guarantee offer, he had a telephone conversation with Mr. David Weissman, an attorney representing plaintiff and Micro, who told him that the people at Ajax were planning to retain Industrial to do a public sale at auction. Mr. Kriser told him that at that time if they went into an auction "they would get murdered"; that that was the worst kind of a move they could make.

Nevertheless, Industrial was retained to auction the Micro machinery and did so in the Fall of 1967.

NETTER LEWY DOWD FOX NESS & STREAM  
Attorneys for Defendant

Arnold C. Stream,  
Edward M. Berman,  
Of Counsel

EXHIBIT 2 TO EDWARD BRILL'S AFFIDAVIT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

:  
69 Civil 1900

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----X

DEFENDANT'S TRIAL  
OUTLINE

MONASCH CHAZEN & STREAM  
733 THIRD AVENUE  
NEW YORK, N.Y. 10017



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING CORPORATION,	:	
Plaintiff,	:	DEFENDANT'S
	:	<u>TRIAL OUTLINE</u>
-against-	:	
INDUSTRIAL PLANTS CORPORATION,	:	
Defendant.	:	69 Civ. 1900

-----X

Preliminary Statement

This brief will outline the testimony to be adduced by us in behalf of the defendant and will indicate the documents which, marked for identification during pretrial depositions, will be offered by us.

These documents will be identified herein by their pretrial exhibit number followed by a numeral which simply facilitates our locating the exhibits under our internal index system.

Except where we specifically indicate otherwise, authenticity of all documents referred to is admitted

and only objections on grounds of relevance or materiality are reserved

Parties Involved

The following list will provide a convenient place of reference of parties whose names will come up during the trial.

AJAX HARDWARE CORP.

Norman Louis - President

\*Howard Klein - Executive Vice President

TIME & MICRO INSTRUMENTS, INC.

Harry Haakenson

HIRSCHMANN CORP.

\*Martin H. Kaefer

INDUSTRIAL PLANTS CORP.

David Kriser - President

Sidney Kriser - Secretary

\*Jesse Thaler - Vice President

---

\* Depositions to be read.



### Master Chronology

The following is an outline of dates of critical events:

<u>August 10, 1966:</u>	Howard Klein calls Thaler
<u>August 12, 1966:</u>	Thaler visits Howard Klein
<u>August 15, 1966:</u>	Appraisal conducted
<u>August 18, 1966:</u>	Ajax signs loan agreement with Time & Micro Instruments, Inc.
<u>August 19, 1966:</u>	Telegraphic appraisal sent to Ajax.
<u>August 23, 1966:</u>	Norman Louis letter requesting <u>in addition</u> the liquidation value of the machinery and equipmen
<u>August 29, 1966:</u>	Defendant's letter offering a guarantee of buy-out at \$350,000
<u>September 9, 1966:</u>	Ajax guarantees \$270,000 bank loan to Time & Micro
<u>October 7, 1966:</u>	Letter from Thaler defining fair market value basis of an appraisal
<u>November 30, 1966:</u>	Ajax pays \$4,422.71, being amount of invoice based on fair market value computation
<u>October, 1967:</u>	Forced liquidation sale of Time & Micro machinery and equipment at public auction conducted by the defendant

### Basic Issues Involved

As we see it, the basic issues here are:

1. Did the plaintiff rely upon the defendant's appraisal, or was it received after Ajax signed its loan agreement with Time & Micro?
2. Did the defendant deliver to the plaintiff the kind of appraisal which the latter contracted for? If it did, the plaintiff cannot, by comparing that fair market value appraisal with amounts realized from a forced liquidation sale at public auction, ask the jury to infer that, by virtue of the discrepancy between appraised value and amounts realized at auction, the appraisal was negligently prepared. For a fair market value appraisal of machinery and equipment in place is entirely different from an appraisal intended to reflect a forced sale in liquidation at a public auction.\*

### Order of Proof

The following testimony will be offered by

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\* An extension of our legal position and construction of the issue involved is reflected in our Requests To Charge, making it unnecessary for us to repeat those views here at further length.



the defendant on the issue of liability:\*

Jesse Thaler

Martin H. Kaefer

Sidney Kriser

Irvin Richlin (expert)

---

\* The issue of damages is being reserved from the jury until the liability issue is determined. Testimony on damages and mitigation of damages is omitted from this brief.

JESSE THALER

This witness, examined before trial, is a resident of Florida and because of ill health cannot attend this trial. He is no longer an employee of the defendant.

The following testimony was elicited during his examination before trial by the plaintiff's counsel and parenthetical references are to pages in the transcript.

He was Vice President of defendant corporation ("Industrial") during 1966 and had held that office since 1946 (3).

During the same period, David Kriser was President and Sidney Kriser was Treasurer (3).

Robert Botwinick joined Industrial around 1963 and became its auctioneer; Jesse Thaler acted primarily as the appraiser for Industrial (4).



Thaler specialized in appraisal of machinery tool and industrial equipment for over 25 years (6). He is a Senior Member of American Society of Appraisers (6).

[Witness described his experience (7-29)]

Memorandum of Pedigree marked (28).

Ex. 1; (35)\*  
Thaler Memo of  
Pedigree

Thaler first heard of plaintiff ("Ajax") in 1966 when he received a phone call from a Mr. Saxe stating that Ajax wanted an appraisal of a manufacturing plant in Strasburg, Pennsylvania (30). Three or four days later, Thaler met with Howard Klein, Vice President of Ajax (34) to discuss the proposed appraisal (31).

At that meeting, Thaler agreed to do the appraisal of Time & Micro Instruments, Inc. ("Micro") and they set a time for the appraisal about a week from the date of the meeting (35). Fee arrangements were also worked out (35).

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\*Parenthetical references are to our internal exhibit filing system.

Klein asked Thaler to appraise the Micro facility on the basis of "the value of the plant in place and ready for operation, continued operation." Klein impressed Thaler that it was urgent because Ajax was negotiating with the Government for the production of fuses (35-36). Klein told Thaler that Ajax was acquiring the plant from Micro (36-37).\*

Klein told Thaler that he needed the appraisal very quickly and that he would give him an appraisal previously made by another company; he also told him he would arrange to have a Mr. Haakenson, who was to be the vice president in charge of manufacturing at Micro, accompany him to help him do the appraisal (37-38).

Klein told Thaler to rely on the Hirschmann appraisal, merely to update it (44). He said that he was looking for a \$600,000 figure to support financing; but Thaler replied that he would give actual values (51).

Klein also told Thaler that Hirschmann was the agent for manufacturers and knew values, and that its figures were accurate and reliable as of 1964 (56-57); that Thaler could also rely on Haakenson's values in order to expedite matters (62). He told Thaler there was no time to make an independent determination but that he, Thaler, would have to simply rewrite the Hirschmann report (64).

Later at that meeting, the date of the appraisal was moved up from one week to the next day (39) and Klein gave to Thaler a copy of the earlier (1964) appraisal (41).

Ex. 2; (2)  
Appraisal dtd.  
7-1-64 of Hirsch-  
mann Corporation.

---

\* Micro's name was then Precision Instruments, Inc.



[The witnesses identified certain appendages to the appraisal (60, 100)]

Ex. 2A; (2)  
Appraisal  
Summary

Ex. 2B; (2)  
Adding Machine  
Tape

Ex. 2C; (2)  
Another Adding  
Machine Tape

Whereas Klein asked for "a market value appraisal of the plant intact, in place, ready for operation", Norman Louis subsequently wrote to Thaler and asked him to define what was meant in the appraisal as "fair market value". He then added that he "would also like for our own information, what in your opinion the equipment would bring under a forced sale." (69-70)

Ex. 3; (7)  
Ajax letter dtd.  
8/23/66

Returning, then, to his meeting with Klein, Thaler said that Klein arranged by telephone for Thaler to meet Haakenson (79).

On their air trip down to Pennsylvania, Thaler and Haakenson discussed the equipment (85). He told Thaler about the difficulty in getting equipment from Switzerland because, unless one was a member of the syndicate, it could not be ordered; and even then it would take two or three years to assemble it into a single operating plant. (85-86)

[Testimony concerning appraisal methods  
at Strasburg (86-98).]

When he finished the appraisal, Thaler  
telephoned Klein in California (99) and  
told him that he had appraised the Micro  
machinery at \$919,072. plus \$137,000. for  
"in place" value (103).

He confirmed his telephone conversation  
by telegram (107).

Ex. 4; (3)  
TWX dated 8-19-66

On August 19, 1966, Thaler sent Ajax  
an invoice covering the appraisal which  
explicitly reflects the fact that the  
fee is computed as a percentage of  
"fair market value."

Ex. 11; (6)  
Industrial Plants  
Invoice dtd.  
8-19-66

A full appraisal, of course, had been  
sent to Ajax (142).

Ex. 12; (5)  
Industrial Plants  
Appraisal



The appraisal was sent to Ajax with a covering letter (148).

Ex. 13; (4)  
Industrial letter  
dtd. 8-19-66

Thaler did not recall any conversation with Klein during which the question of liquidating value came up (157).

On August 29, 1966, Thaler received a letter from Klein enclosing a proposed "commitment letter" under which Industrial would guarantee to liquidate the machinery for not less than \$500,000. less 20% per year (170).

Ex. 15; (8)  
Ajax letter dtd.  
8-29-66 with  
attached proposed "commitment letter"

Thaler made a note on the letter that no promise had been made to give a "commitment" or a guarantee (171); and Thaler considered Klein's assertion inaccurate (176).

[Asked by counsel whether fair market value was equivalent to replacement value] Thaler said that fair market value was meant to reflect worth to the user in the plant intact, in place (200).

[Thaler thereupon offered counsel his letter to Klein dated October 7, 1966 defining fair market value in very explicit terms (202;272).]\*

Ex. 16;(15)  
Thaler letter to  
Klein dtd.  
10-7-66

This was not the first time Thaler appraised a plant as a going concern; on many previous occasions he evaluated a plant as an in place facility in use (210-211).

[Thaler explained the 15% addition for in place value in terms of the cost of transporting and installing the machinery as a going facility at its site (238-245).]

Thaler received a letter from Klein on October 5, 1966 complaining about the invoice because the appraisal did not reflect a "forced liquidation" figure which he (Klein) knew would be no more than \$450,000. Klein sought an adjustment of the invoice (250).\*\*

Ex. 18;(14.1)  
Klein letter dtd.  
10-5-66

- 
- \* This is a critical exhibit in our view. Klein received this letter [Klein EBT (12)].
  - \*\* This is another critical letter since it contains an acknowledgment that the fair market value appraisal was not a liquidation value, and the further acknowledgment of the plaintiff's President that the liquidation value would not be more than \$450,000.



[The last mentioned letter was sent after a duplicate invoice was mailed to and received by Klein (Klein, 12)]

Ex. 19; (14)  
Duplicate Industrial Plants  
Invoice dtd.  
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On November 28, 1966, Thaler wrote a dunning letter to Ajax (256).

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letter dtd.  
11-28-66

Klein received that letter [Klein (13)]. Plaintiff marked it as an exhibit (256).

On November 30, 1966, Industrial Plants invoice for \$4,422.71 was paid [Klein (13)].

Thaler produced on request the offer of a stand-by guarantee by Industrial in the sum of \$350,000. (268).

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[Thaler produced on request his in-place appraisal of Loft Candy Corp. (328); his in-place appraisal of Calmac Manufacturing Corporation (328); and a list of companies for which Thaler made in-place appraisals (329).]

Ex. 30  
Loft Candy Corp.  
Appraisal;  
Ex. 31  
Calmac Appraisal;  
Ex. 32  
List of In-Place  
Appraisals

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Mr. Kaefer was an official of Hirschmann Corp. of Roslyn, Long Island. He made the 1964 appraisal which underlay Thaler's two years later.

His deposition was taken by us in 1970. Since then, he has moved to Connecticut, a distance of something more than 100 miles from the City. We shall subpoena him but if he refuses to appear, we shall ask leave to read his deposition instead.

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Hirschmann Corp. was a distributor of European machinery tools (4). The majority of its equipment comes out of the narrow area known as "the watch area of Switzerland" (5).

Mr. Kaefer identified his 1964 appraisal of the Micro facilities and his letter covering the same to Mr. Jacob Shrirer, then the owner of Micro (11-12).

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Kaefer letter dtd.  
7-1-64  
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[Mr. Kaefer describes his inspection and appraisal methods (15-29).]

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There was therefore no significant depreciation in the utility of the machinery during the two years following his appraisal, assuming normal maintenance (35-36).

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The most that could have happened is that the \$793,000. value could have shrunk two years later to \$625,000. (42).

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\*Note our supplemental requests to charge on the element of "reliance."

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His first dealing with Ajax was in 1966 when he received a telephone call and referred the party to Mr. Thaler, since it was an appraisal matter.

Sometime later, he got a telephone call from Kline asking for a guarantee; but this was after the appraisal had been made.

As a result of the conversation, he wrote a letter to Kline dated August 30, 1966.

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(9)  
Kriser letter dtd.  
8-29-66

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\* Not covered by stipulation of authenticity.



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Nevertheless, Industrial was retained to auction the Micro machinery and did so in the Fall of 1967.



IRVIN RICHLIN'S TESTIMONY

This witness will testify as an expert.

For some ten years (1951-1958), he worked as a salesman for Hirschmann Corp.\*, which was a corporation acting as the general agent for Swiss manufacturers of watch and precision instrument machinery.

Since 1961 he has operated his own business, The Richlin Company, which purchases and deals in used, high precision watch and fuse making machinery and equipment of Swiss origin.

He has become skilled in the evaluation of that kind of machinery and equipment and has in fact on one or more occasions been called upon to serve as an appraiser.

He did appraisal work for Bulova.

Early in 1966 he had occasion to visit the Micro facilities at Strasburg, Pennsylvania, having been a friend of Jacob Shrirer at the time.

He recognized that facility as unique in its components and unique as a specialty precision plant operating on-site.

Its uniqueness consisted of the fact that --

- it represented a fully equipped facility;

---

\* See supra p. 14.

- 90% of the machinery was of Swiss origin;

- practically all of it was irreplaceable because of Swiss embargoes; and

- all of it was in mint condition.

There is no possible way for developing any reasonable ratio between the fair market value of that plant as a going facility and the price which was obtainable upon the individualized sale of its components at a liquidation sale under an auctioneer's hammer.

In the opinion of this expert, a recovery of even one-tenth of its fair market value under those conditions would be reasonable to expect.

MONASCH CHAZEN & STREAM  
Attorneys for Defendant

Arnold C. Stream,  
Of Counsel



EXHIBIT 3 TO EDWARD BRILL'S AFFIDAVIT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

69 Civil 1900 (RHL)

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

-----X

DEFENDANT'S MEMORANDUM OF  
LAW ON CONTRACT WAIVER

MONASCH CHAZEN & STREAM  
733 THIRD AVENUE  
NEW YORK, N.Y. 10017  
A-312

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

:  
69 Civil 1900 (RHL)  
:  
DEFENDANT'S MEMORANDUM OF  
LAW ON CONTRACT WAIVER

-----X

Nothing is more dangerous to the law than the presentation of a statement as unqualified when in fact it is otherwise. There are a plethora of legal maxims, legal principles and legal postulates most of which are diminished in meaning and influence by the exceptions which have been engrafted to them. The principle generally applied to the treatment of payments made on a contract is a classic example.

It is generally stated (although little understood) that payment alone will not constitute a waiver of a provision in a contract. Standing by itself, that statement



has nearly achieved the dignity of a legal axiom. The fact of the matter is, the statement is empty and meaningless because of the qualifications which have been constructed by the courts so as to diminish, indeed emasculate, that empty rule.

Payment alone will not constitute a waiver of a provision in a contract only when the paying party at all times insists upon strict performance by explicit reservation of rights. Gail v. Gail, 127 App. Div. 892. The only time -- and we emphasize the word only -- that payment without explicit reservation of rights does not constitute a waiver of contract rights is where the breach is subsequently discovered. In such situation it obviously cannot be said that a party making a payment waived an unknown right. Armstrong Cork etc. Co. v. Pirone, 135 Misc. 819, is a clear example of this point and stands for that narrow proposition. The judge in that case expressed it in the following terms:

"While the defendant may be held to an abandonment of any claim of damages for defective work which existed at the time the note was made, he should not be precluded from proving, if he can, a subsequent claim for damages."

In our case the defendant makes an entirely

The duty rests upon the party claiming a breach to act promptly upon the first discovery of the breach; it may not accept acts which are presented as performance of the contract by the other party, pay for them, and then be permitted to sue on the breach. And that is the substantive law of this State. Grant v. Pratt & Lambert, 52 App. Div. 540 (1st Dept. 1900) and cases therein cited; Diehl v. Schmalacker, 30 Misc. 786 (App. Term 1900).

The United States Supreme Court has stated this principle in a slightly different way. No party, teaches that court, can avoid the legal consequence of its act by protesting that it does not subject itself to the consequences of its act. International Contracting Co. v. Lamont, 155 U.S. 303 (1894).

For these reasons, we believe it to be an absolute requirement that this learned Court give these instructions to the jury on this most critical issue, and toward that end, there will accompany this memorandum of law a supplemental request by the defendant covering this subject.

We believe that we have demonstrated not only the propriety of a defense of waiver but its clear sufficiency as a matter of law as an asserted defense.

Respectfully submitted,

MONASCHI CHAZEN & STREAM  
Attorneys for Defendant

Arnold C. Stream,  
Robert G. Smith



EXHIBIT 4 TO EDWARD BRILL'S AFFIDAVIT

NETTER LEWY DOWD FOX NESS & STREAM

ATTORNEYS AND COUNSELORS AT LAW

660 MADISON AVENUE • NEW YORK, N. Y. 10021

212/TEMPLETON 9-5335

(NETTER & NETTER,  
1916-1962)

PARIS OFFICE  
53, RUE LA BOETIE,  
PARIS, VIII<sup>E</sup>  
ELY 15 81

CABLES  
NETTERLAW  
CLAUDLEX NEW YORK  
LEXCLAUO PARIS  
WALTER SOCOLOW  
COUNSEL

LEWY

AND NEW YORK OFFICES

CHARO NETTER  
VING FOX  
RECTOR G. DOWD  
THEODORE NESS  
MARIE LOUISE STERN  
ARNOLD C. STREAM  
JOHN B. ALFIERI  
ABBOTT GOULD  
ALAIN DECOSSE  
JULES L. WACHT  
JOHN L. GOLOSTONE  
CARL F. AXELROD  
LEE EPSTEIN  
DAVID J. GILBERT  
EDWARD M. BERMAN  
PAUL FROMMAN

February 19, 1974

Honorable Richard H. Levit  
United States District Judge  
U.S. Courthouse  
Foley Square  
New York, N.Y.

Re: Ajax Hardware v. Industrial Plants  
69 Civ. 1900

Honorable Sir:

Enclosed are our requests to charge in behalf  
of the defendant.

We shall file with you next week our trial  
memorandum outlining the testimony and indicating the  
exhibits to assist you in marshaling the evidence at the  
close of the trial.

We intend to make a serious motion to dismiss  
each of the three counts at the close of the plaintiff's  
case on factual grounds which we hope will be evident  
to you after you have read our requests to charge and  
our trial brief.

Neither the requests nor our brief deals with  
the damage issue which Your Honor declared would be re-  
served from the jury until there is a disposition by the  
Court or jury of the fundamental question of liability.  
For the same reason, we have excluded references to  
factual areas dealing with mitigation of damages.

Respectfully yours,

  
Arnold C. Stream

cc: Poletti Freidin Prashker  
Feldman & Gartner

EXHIBIT 5 TO EDWARD BRILL'S AFFIDAVIT

MONASCH CHAZEN & STREAM  
ATTORNEYS

733 THIRD AVENUE  
NEW YORK, N. Y. 10017

TEL: (212) 867-1880  
CABLE: LEXMOCHA NY

October 2, 1975

Honorable Richard H. Levet  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York

Re: Ajax v. Industrial Plants  
69 Civil 1900

My Dear Judge Levet:

We deliver to you herewith in duplicate  
the following:

1. Defendant's request for a preliminary charge.
2. Defendant's Requests to Charge.
3. A short outline of those Requests.

We are serving upon our adversary a copy of the first item only. We prefer not to deliver our end of the trial Requests at least until the plaintiff's case is in; this for the reason that those Requests are at this juncture an unnecessary disclosure of our trial tactics. We propose to inform our adversary and to tell him that he need not provide us with the plaintiff's Requests until the plaintiff rests. Unless we are otherwise instructed by the Court, we shall pursue this approach.



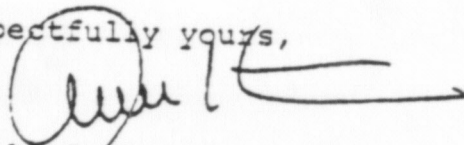
Honorable Richard H. Ievet  
Page 2  
October 2, 1975

The only reason we enclose an outline is to provide the Court with a bird's eye view of our Requests which, unlike the ones traditionally served, are not fragment propositions of fact and law but are really an integrated series meant to encompass all of the issues of the entire case. We trust the outline will be helpful in this connection.

The procedures as suggested above conform to Rule 51 which, absent a contrary direction by the Court, does not require the submission of requested instructions to the jury until "the close of the evidence \* \* \*."

We shall provide the Court at the opening of the trial with a very brief memorandum of law covering our motion for leave to add the defense of waiver. Your Honor will note that this issue is covered in Paragraph 24 of our Requests.

Respectfully yours,



Arnold C. Stream

ACS:jpm  
Encls.

cc: Poletti, Freidin, Prashker,  
Feldman & Gartner

P.S. With very few exceptions, every legal proposition and definition contained in our Requests were drawn from "New York Pattern Jury Instructions-Civil," prepared by a committee composed of New York State Supreme Court justices.

EXHIBIT 6 TO EDWARD BRILL'S AFFIDAVIT

MONASCH CHAZEN & STREAM  
ATTORNEYS

733 THIRD AVENUE  
NEW YORK, N.Y. 10017

TEL: (212) 667-1890  
CABLE: LEXMOCHA NY

October 10, 1975

BY HAND

Honorable Richard H. Levet  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York

Re: Ajax v. Industrial Plants  
69 Civil 1900

Honorable Sir:

Enclosed herewith is an addition to our Requests to Charge (and a short supporting memorandum) which is meant to elucidate on the law of the waiver of contract breach. Since we are not yet obliged to serve our Requests upon plaintiff's counsel, we are not serving these papers upon him at this time. We shall, of course, serve both the additional Requests and the supporting brief when the plaintiff rests.

Respectfully yours,

  
Arnold C. Stream

ACS:jpm  
Encls.

P.S. Your Honor may also find the enclosed memo helpful in reaching a determination as to the propriety of our proposed additional defense of waiver.

ACS



EXHIBIT 7 TO EDWARD BRILL'S AFFIDAVIT

The Second Circuit Court of Appeals

April 21, 1975

10:10 A.M.

Richard H. Levet, D. J.

Ajax Hardware v. Industrial Plants, 69 Civil 1900

Pending determination of the order to show cause in the mandamus in the above-entitled case, I am, of course, making no order.

However, I believe that in fairness to the trial court and for the information of the Appeals Court the following background should be stated:

(1) On March 6, 1975 both counsel asked for a firm date for trial and the court directed that the trial proceed on April 21, 1975, which was agreed to by counsel;

(2) On April 17, 1975 counsel for plaintiff came before the court asking for a continuance for an indefinite period by reason of the fact that he was informed that one Norman Louis, a resident of California, could not appear for trial on April 21, 1975 due to a reported heart condition. No medical certificate was supplied nor has it been supplied to date as to why said witness cannot attend.

On April 17, 1975, after hearing counsel, I was not convinced that Mr. Louis' testimony was reasonably relevant or necessary. At that time I asked counsel to call the physician who was treating the witness Louis to ascertain whether or not a deposition could be taken and on April 18, 1975, when counsel for both sides appeared before me at 11:00 A.M., counsel for plaintiff plainly conceded that the doctor had stated that the said deposition could be taken at the witness' home and it is my definite recollection that it was agreed that counsel should go to California and take this deposition and that the trial would be delayed solely to secure the transcript of that deposition.

On Friday afternoon, April 18, 1975, I was served with a mandamus proceeding. In view of the definite arrangement which was

made to take the deposition I was, of course, greatly surprised to learn about the mandamus. Counsel for defendant has opposed the adjournment application and stated that he has a number of witnesses who had come from a distance who are to testify. He also stated that as to certain items he would stipulate or agree that certain facts are true.

After all, both defendant and plaintiff are entitled to a trial.

---

United States District Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING  
CORPORATION,

: 69 Civ. 1900 (RHL)

Plaintiff,

: DEFENDANT'S OBJECTION TO  
: PLAINTIFF'S PROPOSED FURTHER  
: STATEMENT OF PROCEEDINGS  
: DATED MARCH 4, 1976 SERVED  
: ON MARCH 11, 1976

-against-

INDUSTRIAL PLANTS CORPORATION,

:

Defendant.

-----X

S I R S :

PLEASE TAKE NOTICE that the undersigned hereby objects to the proposed statement of proceedings of the plaintiff dated March 4, 1976 upon the following grounds:

1. An essential portion of Paragraph 1 of said Statement is untrue.

2. None of the documents and averments respecting the same irrespective of their truth, completeness or accuracy, is relevant to any of the contentions posited by the plaintiff, as appellant, to the United States Court of Appeals for the Second Circuit.

3. None of the documents was before the jury which sat

in each of the two trials from which an appeal has been taken and none of them could therefore in any way have affected the outcome thereof.

Dated: New York, N. Y.  
March 17, 1976

Yours, etc.

MONASCH CHAZEN & STREAM

By 

Arnold C. Stream, a member thereof  
Attorneys for Defendant  
733 Third Avenue  
New York, N. Y. 10017

TO: POLETTI FREIDIN PRASHKER  
FELDMAN & GARTNER  
Attorneys for Plaintiff  
777 Third Avenue  
New York, N. Y. 10017



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AJAX HARDWARE MANUFACTURING  
CORPORATION,

Plaintiff,

-against-

INDUSTRIAL PLANTS CORPORATION,

Defendant.

: 69 Civ. 1900 (RHL)

:

: AFFIDAVIT IN OPPOSITION  
: TO PLAINTIFF'S MOTION

:

:

-----X  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

ARNOLD C. STREAM, being duly sworn, deposes and says:

1. This affidavit opposes the motion of the defendant to include the Record on Appeal in this action, the various documents and the statements of counsel pertaining thereto which are set forth in its Statement dated March 4, 1976, attached to its instant notice of motion.

2. Attached hereto is a copy of our categorical objections to the plaintiff's Statement served in accordance with the requirements of Rule 10(c) of the Federal Rules of Appellate Procedure.

3. Although the objections represent a sufficient response to indicate our position in the matter, the implicit virulence of the plaintiff's Statement calls for a more complete response by us to avoid any possible inference that we acquiesce by silence in any aspect of that highly-charged, ad hominem attack against counsel and judge.

4. The Court will recall that essentially this lawsuit involves a commercial appraisal which the plaintiff-appellant claims was prepared improperly to its damage in the sum of approximately \$161,000. The case boiled down ultimately to a resolution of a single issue: Did the plaintiff-appellant receive the kind of an appraisal (i.e. the fair market value of certain plant machinery and equipment) which it had ordered and paid for or did the defendant-respondent deliver an appraisal which had not been ordered?

5. Despite this relatively narrow and uncomplicated ultimate fact issue, there have already been proceedings so voluminous and so lengthy as to compete with anti-trust cases for sheer prolixity.

6. Here, as the Court will doubtlessly recall, is just a bare-bones outline of what has already transpired:

(a) The plaintiff-appellant filed a petition for mandamus with the Court of Appeals seeking to delay the original trial date. According to our count, over



100 pages were submitted by the plaintiff-appellant on that application. It was denied by the Court of Appeals the very day it was argued. Those papers have been designated for inclusion in the record.

(b) The trial proceeded on the originally scheduled date and consumed six trial days in April, 1975. The case ended with a compromise verdict. The transcript of the record is almost 800 pages in length. Plaintiff-appellant is including that transcript in its proceedings before the Court of Appeals.

(c) Post-trial motions were made following the verdict. They involved by our rough estimate over 300 pages of submissions which included affidavits and exhibits. Those papers have been designated for inclusion in the record to the Court of Appeals.

(d) After the verdict was set aside but before the date set for the re-trial of the action, the plaintiff-appellant made a motion seeking to have this Court disqualify itself from presiding at that re-trial. The motion was denied. Hundreds of pages of typewritten papers were submitted in connection with that application. And the plaintiff-appellant has designated those papers for inclusion in the record to the Court of Appeals.

(e) The re-trial of the action took even longer than the first action, consuming seven trial days in October, 1975. A verdict was rendered in favor of the defendant. Those re-trial proceedings are reflected in over 1,000 pages of transcribed testimony. That transcript has also been designated by the plaintiff-appellant as part of the record to be submitted to the Court of Appeals.

7. Thus, we find already facing the Court of Appeals an astonishing quantity of motions, petitions, hearings, and testimony not to mention pleadings, interrogatories and other procedural papers which constitute requisite components of an appellate record.

8. The plaintiff-appellant has already indicated that in its appellate proceedings it will attack the scheduling of the first trial; it will attack the Court's conduct of the first trial; it will attack the Court's rulings during the first trial; it will attack the conduct of counsel for the defendant-respondent at that trial; it will attack the form of the verdict submitted to and rendered by the jury at that trial; it will attack the decisions of this Court rendered at the end of the first trial which resulted in the setting aside of what was held to have been an evident compromise verdict in favor of the plaintiff-appellant; it will attack the refusal



of this Court to disqualify itself from sitting at the second trial; it will attack both the qualifications and the impartiality of this Court in connection with the conduct of the second trial; it will attack the rulings of this Court during the second trial; it will attack the summation of counsel for the defendant-respondent at the second trial; it will attack the propriety of the special verdict form submitted to the jury at the second trial; it will attack the verdict which was rendered at that second trial; it will make a series of contentions claiming the impropriety of certain facts and documents admitted into the second trial; and it will finally contend that there never should have been a second trial -- which is probably the truest thing uttered by counsel for the plaintiff-appellant in this melange of proceedings.

9. And now, piling Pelion on Ossa, counsel for the plaintiff-appellant seeks in effect to add this firm as a defendant-respondent and to add to the record another 100 pages to the already indigestible volume to be offered to the Court of Appeals.

10. To begin with, we take frontal issue with counsel for the plaintiff-appellant in their averment, with but two exceptions, that the papers listed in Paragraph 1 of the plaintiff's Statement were delivered to the Court but not "served" upon plaintiff's counsel. The letters identified as Exhibits 4, 5 and 6 were handed to counsel

in Court at the time when we delivered to counsel our requests to charge, which date preceded the date when this Court ruled on the propriety of the charge requests made by both sides. The memorandum of law on contract waiver (Exhibit 3) was handed to the Court, and a copy handed to counsel, following a request made several days earlier in open court by the Court itself for a short memorandum to support our request that the charge include the law on contract waiver. Our request for that charge was ultimately refused.

11. We mentioned that there were two exceptions. There were. We did not serve upon counsel for the plaintiff-appellant either of the trial briefs attached as Exhibit 1 and Exhibit 2 for the reason that they were nothing but the defendant's statements of its order of proof. Indeed, each was actually entitled "Defendant's Trial Outline." And we did not serve those because they had been designed simply to facilitate the trial by disclosing to the Court our plan for each trial, our order of proof and the relationship of various parts of the proof to issues of the case. They were not designed to argue issues or to persuade the judge in this jury case.

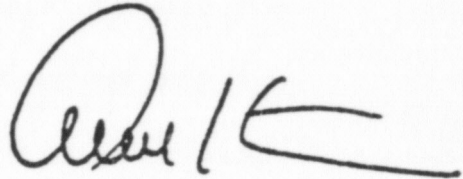
12. We suppose that counsel for the plaintiff-appellant seeks to attribute to us a professional breach in this respect. It was nothing of the sort. Even if it were, the proper forum for



complaints of that nature is certainly not the Court of Appeals.

13. In these circumstances, the attempt of counsel for the plaintiff-appellant to challenge this firm to an ethical duel and to include that contest in the already overburdened record of proceedings to be certified to the Court of Appeals is to our mind unmeritorious and of questionable good faith.

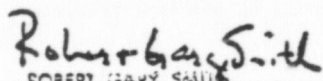
14. For all these reasons we respectfully submit that the plaintiff's motion should be denied.



---

Arnold C. Stream

Sworn to before me this  
17th day of March, 1976.

  
ROBERT GARY SMITH  
Notary Public, State of New York  
No. 24-4513697  
Qualified in Kings County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

AJAX HARDWARE MANUFACTURING CORPORATION, : 69 Civ. 1900 (RHL)

Plaintiff,

-against-

AFFIDAVIT IN SUPPORT  
: OF MOTION TO CORRECT  
RECORD ON APPEAL

INDUSTRIAL PLANTS CORPORATION, :

Defendant. :

-----X

EDWARD A. BRILL, being duly sworn, deposes and  
says:

1. This reply affidavit is submitted in support of plaintiff-appellant's motion, made on March 11, 1976, to correct the Record on Appeal in the above-entitled action by inclusion of a Statement of Proceedings in the District Court, describing the ex parte submission of documents by defendant's attorney to the trial court, and by the trial court to the Court of Appeals.

2. The only function of the trial court upon this motion, made pursuant to F.R. App. P. 10(c) and 10(e), is to determine what transpired in the District Court in the event of a dispute between the parties as to what actually occurred. Contrary to the suggestion of defendant, this Court has no authority to exclude from the Record on Appeal reference to any



actual event or occurrence in the District Court proceedings on the grounds that the event is irrelevant to the appeal, that it would not have affected the outcome of the proceedings, or that the record is already too bulky. Treasure Imports, Inc. v. Henry Andes & Sons, 127 F.2d 3 (2d Cir. 1942); 9 Moore's Federal Practice, ¶210-08[1]. Defendant's objections No. 2 and No. 3 to plaintiff's proposed statement of proceedings, founded upon the relevance of the documents and events, thus misperceive the District Court's authority with respect to this motion and are without merit.

3. While defendant's first objection to the Proposed Statement is that "an essential portion of paragraph 1 of said Statement is untrue", defendant does not dispute, and indeed admits, certain other "essential portions" of that Statement.

4. Defendant acknowledges that it "did not serve upon counsel for plaintiff-appellant either of the trial briefs attached as Exhibit 1 and Exhibit 2." (Stream Aff't, ¶11.) Furthermore, defendant does not dispute the statement in paragraph 1 of the Proposed Statement that these two briefs were submitted to the trial court without notifying attorneys for plaintiff of the submission of said documents to the court. Thus, there is no factual dispute for this Court's determination with respect to the submission of document Nos. 1 and 2 to the trial court, without service upon or notice to plaintiff's attorneys, and these facts must be included in the Statement

to be added to the Record on Appeal.

5. Defendant's statement concerning the submission of its Memorandum of Law on Contract Waiver (Exhibit 3) conflicts with the documentary record. Mr. Stream states that this memorandum "was handed to the Court, and a copy handed to counsel, following a request made several days earlier in open court by the Court itself for a short memorandum to support our request that the charge include the law on contract waiver" (Stream Aff't, ¶10). The record shows, on the contrary, that Mr. Stream delivered the original Memorandum on Contract Waiver to the trial court on October 10, 1975, and informed the court at the time of submission that defendant would not serve that memorandum on plaintiff until the close of Plaintiff's direct case. (Letter from Arnold Stream, Esq. to Hon. Richard H. Levet, dated October 10, 1975, Exhibit 6). The notation on the original Memorandum confirms that it was received by the trial court on October 10, 1975 (Exhibit 3). Defendant's statement that the Memorandum "was handed to court, and a copy handed to counsel" is not only contrary to Mr. Stream's contemporaneous representation to the court that he would not serve a copy on plaintiff's attorneys until the close of plaintiff's case, but since there was no proceeding in court on October 10, 1975 the statement cannot be true if intended to mean that the Memorandum was handed to the trial court and plaintiff's counsel during a



court proceeding on that day.

6. Defendant now contends that letters from Mr. Stream to the trial court identified as Exhibits 4, 5 and 6 were handed to counsel at the time when defendant delivered to plaintiff's counsel its requests to charge. We deny that copies of the letters were "handed" or otherwise delivered to plaintiff's attorneys at any time, but it is at least clear that the letters were not delivered to plaintiff's counsel when they were delivered to the court. Thus, defendant does not claim that it mailed a copy of any of the letters to plaintiff's attorneys, even though the letters dated February 19, 1974 and October 2, 1975 (Exhibits 4 and 5) each indicate that a copy was delivered to plaintiff's attorneys. (Nor does defendant explain why a copy of these letters would have been "handed" to counsel in court, if a copy had been previously mailed). Defendant does claim that copies of the letters were handed to plaintiff's attorneys when it delivered its Requests to Charge. However, the trial record of April 29, 1975 (First Trial) and October 20, 1975 (Second Trial) contains no indication that any of the letters were delivered on those dates, although there is reference to the exchange of Requests to Charge.

7. Defendant does not dispute or address the portion of the Proposed Statement regarding the trial court's submission of a Memorandum to the Court of Appeals on April 21, 1975 (Exhibit 7).

8. In view of the facts which are now admitted by defendant, and the undisputed circumstances described above, the following facts are established:

(a) Defendant filed its Trial Briefs (Exhibits 1 and 2) without service upon plaintiff's attorneys, and without notice to plaintiff's attorneys that said briefs were submitted.

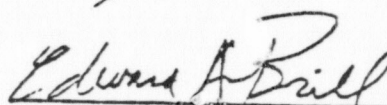
(b) Defendant filed its Memorandum of Law on Contract Waiver on October 10, 1975. Defendant represented to the Court on October 10 that it would not serve the Memorandum on plaintiff until the close of plaintiff's case; nonetheless, the Court ruled on defendant's motion on October 14, 1975. Defendant now claims to have "handed" the Memorandum to plaintiff's attorneys on an unspecified date. Defendant claims to have delivered a copy of its letter to the trial court (Exhibit 6) dated October 10, 1975 to plaintiff's attorneys on October 20, 1975.

(c) Defendant did not mail a copy of its letters to the trial court dated February 19, 1974, October 2, 1975, and October 10, 1975 (Exhibits 4, 5 and 6) to plaintiff, at the time

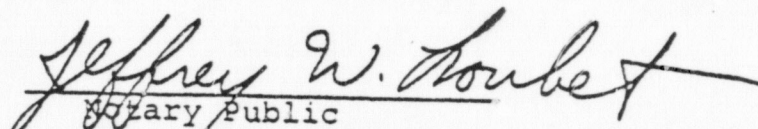


the letters were sent to the trial court.  
Defendant now claims to have handed copies  
of the letters to plaintiff's attorneys on  
April 29, 1975 (Exhibit 4) and October 20,  
1975 (Exhibits 5 and 6).

9. Plaintiff's motion should be granted, and the  
Proposed Statement of Proceedings in the District Court, should  
be included in the Record on Appeal.

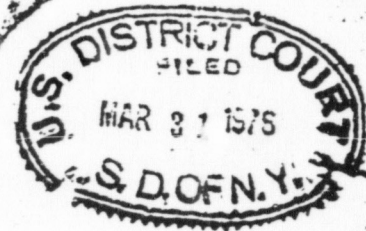
  
EDWARD A. BRILL

Sworn to before me this  
24th day of March, 1976

  
Notary Public

JEFFREY W. LOUBET  
Notary Public, State of New York  
No. 60-7602750  
Qualified in New York County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----  
AJAX HARDWARE MANUFACTURING CORPORATION,

Plaintiff,

-against-

69 Civil 1900

INDUSTRIAL PLANTS CORPORATION,

Defendant.  
-----

MEMORANDUM  
and  
ORDER

LEVET, D. J.

# 441146

Plaintiff-appellant, Ajax Hardware Manufacturing Corporation, after a second trial ended with a verdict for defendant, Industrial Plants Corporation, has moved, pursuant to Rules 10(c) and 10(e) of the Federal Rules of Appellate Procedure, for settlement and approval of a "statement of proceedings" to be included in the record on appeal. This proposed statement, a copy of which is attached hereto, refers to seven documents which are described below. Of these, six are documents which were submitted to this court by defendant prior to and during trial. The remaining document is a written statement which I prepared and which I expected to be filed in the office of the clerk of the district court as hereinafter stated.

The proposed statement for which plaintiff seeks approval is, in effect, an admission by the court that the court accepted documents submitted by defendant knowing that the same had not been served or delivered to plaintiff and that the statement by me was forwarded to the



Court of Appeals without service of a copy on plaintiff or without informing plaintiff thereof.

Defendant objects to the proposed statement in its entirety upon the following grounds:

- (1) That an essential portion of the statement is untrue;
- (2) That all of the documents which defendant was required to serve were in fact served;
- (3) That none of the documents is relevant or material to any of the contentions posited by plaintiff in the appeal; and
- (4) That none of the documents was before the jury and none could therefore in any way have affected the outcome of either the first or second trial.

These seven documents are as follows:

(1)

Exhibit 1. A document entitled, "Defendant's Trial Outline," dated, receipt by court indicated on February 28, 1973 (first trial), which includes headings as follows: Preliminary Statement; Parties Involved; Master Chronology (containing various dates); Basic Issues Involved; Order of Proof. There is also contained a sketchy statement of what the principal witnesses either stated on depositions or, according to defendant, would testify to at trial. All of these items were matters of proof which obviously the order and method of presentation could be determined at will by defense counsel and with respect to which he had no obligation to follow or to inform his adversary.

(1) References to exhibits numbers 1 through 7 are to exhibits attached to plaintiff's affidavit in support of this motion, a copy of which is 2

There is no showing that this document is material to the appeal in this case.

Exhibit 2. A paper entitled, "Defendant's Trial Outline," undated, receipt by court indicated on March 14, 1975. This has similar items in it and is no more relevant or material than Exhibit 1 above mentioned. This "outline" could be followed at the will of defense counsel. It was no strait jacket. It was not evidence.

Exhibit 3. Defendant's memorandum of law on contract waiver, undated, receipt by court indicated on October 10, 1975, which was during the second trial. The court read this memorandum but since it concerns a request of defendant to charge which was refused, there is no reason why this item is relevant or material to the disposition of this appeal as a factual recital.

Exhibit 4. A letter to the court, dated February 19, 1974, from Arnold C. Stream, counsel for defendant. I have examined this letter; it refers to the following:

- (a) Requests to charge were enclosed;
- (b) A trial memorandum outlining the testimony was indicated;
- (c) Statement of intention to make a motion to dismiss each of the three counts at the close of plaintiff's case on factual grounds.

There can be no materiality or relevancy to this notice. In fact, it was not necessary for defense counsel to notify plaintiff's counsel in advance that he would make such motions. The defendant could follow its own plan of attack. The letter was clearly intended



only to aid the court in its understanding of the case.

Exhibit 5. Letter to the court dated October 2, 1975, signed by Arnold C. Stream of counsel for defendant. This letter indicated delivery to the court of duplicate copies of defendant's requests for preliminary charge, defendant's charge to the jury, and a short outline of these requests. All these items related to the second trial. The court ruled on these requests on the record and before summations of counsel. Plaintiff does not show that this letter is material to any issue on appeal.

Exhibit 6. A letter dated October 10, 1975 from Arnold C. Stream, counsel for defendant, to the court. This included an additional request to charge and a short supporting memorandum. Defense counsel noted that he was not obliged to serve requests upon plaintiff's counsel at that time which, of course, is true under Rule 51 of the Federal Rules of Civil Procedure which requires submission of requests only after the conclusion of all testimony. I likewise fail to see the materiality or relevance of this document to any issue on this appeal.

Exhibit 7. A memorandum dated April 21, 1975, which was filed by the court with the Court of Appeals for the Second Circuit on April 21, 1975 in respect to a mandamus proceeding. I believe there is no dispute about the facts which are stated therein. The explanation in the memorandum relates to the apparent consent of counsel for the

plaintiff and defense counsel to California to take the deposition testimony of a certain invalid witness, one Norman Louis. As I recall it and as I am informed, the attorney for defendant traveled to California and was prepared to then take the deposition; however, plaintiff's counsel did not appear but remained in New York to present his mandamus petition.

The mandamus petition asked for an order directing the trial court to adjourn the trial of the action, which had been set for a day certain. Under the circumstances, there was no valid reason for any adjournment. The basic purpose of seeking that mandamus was to secure an adjournment of a day or two which in effect eventuated since the case went to trial two days later than the day originally scheduled. Moreover, this court's belief that Norman Louis was an unnecessary witness is confirmed by the fact that in neither the first or second trial was Louis called as a witness and particularly because defense counsel made a stipulation of concessions which obviated the necessity of Louis' presence at trial. It is also important to note that at the conference before this court prior to Stream's journey to California no order directing any deposition was made but only consents were discussed. In any event, the Court of Appeals denied the mandamus. Here, there is no materiality.

Concerning Paragraph 1 of plaintiff's proposed statement, which only deals with the aforementioned Exhibits 1 through 6, the court agrees with defendant's claim that an essential portion of that paragraph



is untrue. In his affidavit in opposition to the present motion, counsel for defendant states, in paragraph 10:

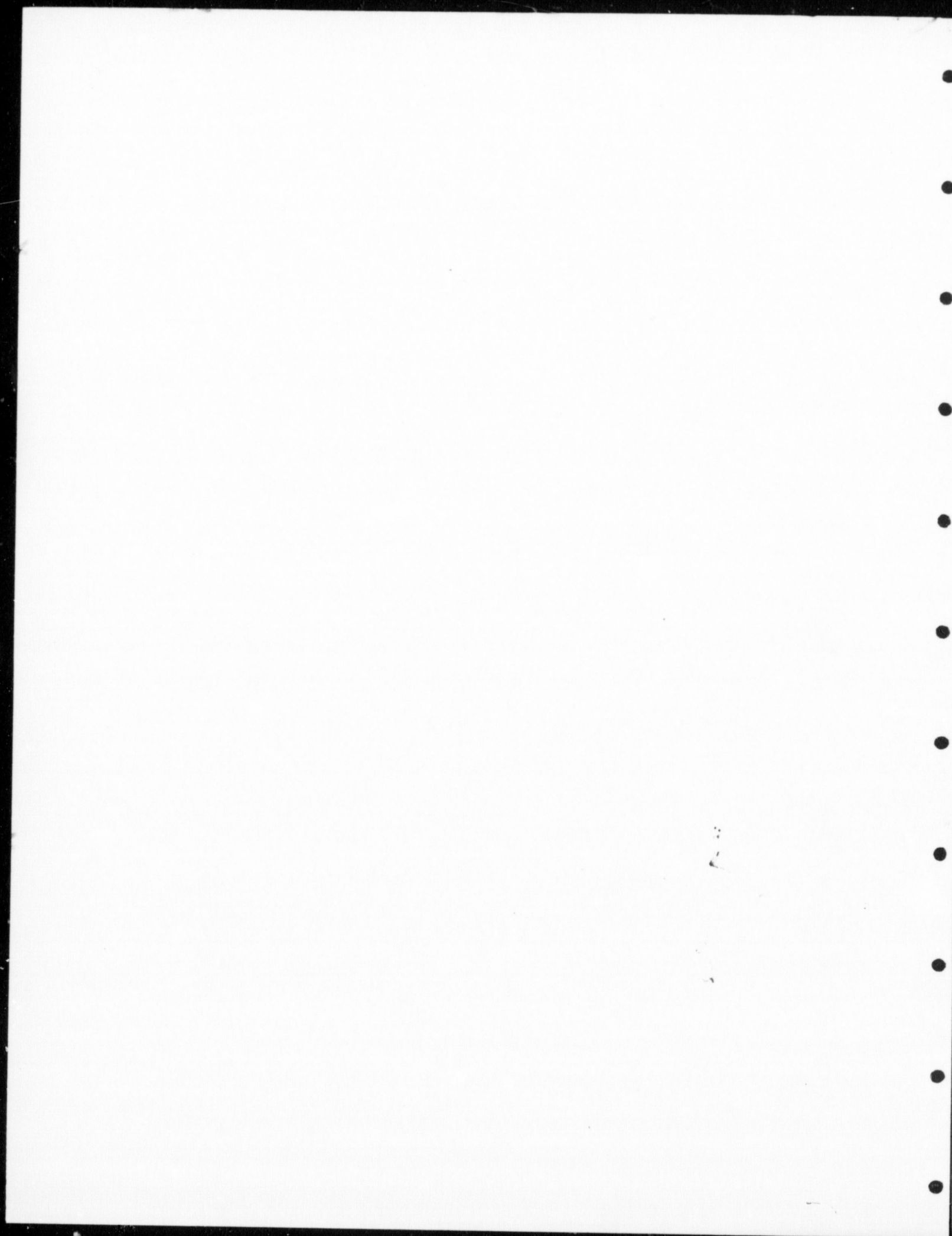
"\*\*\* The letters identified as Exhibits 4, 5 and 6 were handed to counsel in Court at the time when we delivered to counsel our requests to charge, which date preceded the date when this Court ruled on the propriety of the charge requests made by both sides. The memorandum of law on contract waiver (Exhibit 3) was handed to the Court, and a copy handed to counsel, following a request made several days earlier in open court by the Court itself for a short memorandum to support our request that the charge include the law on contract waiver. Our [i.e., defendant's] request for that charge was ultimately refused."

In paragraph 11 of the same affidavit, counsel for defendant states:

"\*\*\* We did not serve upon counsel for the plaintiff-appellant either of the trial briefs attached as Exhibit 1 and Exhibit 2 for the reason that they were nothing but the defendant's statement of its order of proof. Indeed, each was actually entitled 'Defendant's Trial Outline.' And we did not serve those because they had been designed simply to facilitate the trial by disclosing to the Court our plan for each trial, our order of proof and the relationship of various parts of the proof to issues of the case. They were not designed to argue issues or to persuade the judge in this jury case."

Obviously defense counsel had his own options as to the order of presentation of his own case. Clearly, plaintiff had timely receipt of all papers to which it was entitled from defendant. Paragraph 1 of plaintiff's proposed statement, therefore, is not a "statement of the evidence or proceedings at a hearing or trial" within the ambit of Rule 10(c) of the Federal Rules of Appellate Procedure and approval of said paragraph for inclusion in the record on appeal is denied.

I note in passing that there is no Paragraph 2 of plaintiff's proposed statement.





Paragraph 3 of plaintiff's proposed statement concerns only Exhibit 7, which is my memorandum in connection with the mandamus proceeding. At the time this statement was in fact filed in the Court of Appeals I expected it would be first filed in the District Court of the Southern District and subsequently noted in the New York Law Journal, which, I am informed, did not occur.

The court has reservations as to whether Paragraph 3 of plaintiff's proposed statement is a "statement of the evidence or proceedings at a hearing or trial" within the meaning of Rule 10(c) or whether the court's memorandum to which that paragraph refers is "material" to any issue on appeal within the meaning of Rule 10(e) of the Federal Rules of Appellate Procedure. Nevertheless, the court approves only Paragraph 3 of plaintiff's proposed statement for inclusion by the clerk of the district court in the record on appeal.

Consequently, the motion by counsel for plaintiff-appellant is granted to the extent above indicated but is otherwise denied in all respects.

So ordered.

Dated: New York, N.Y.  
March 30, 1976

(SGD) RICHARD H. LEVET  
United States District Judge